

UN Convention on the Rights of the Child Bill, Equalities and Human Rights Committee Inquiry

October 2020

The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the National Human Rights Institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

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1. Will the Bill make it easier for children to access their rights?

This Bill is a highly significant and most welcome step to progress children's rights in Scotland. The Commission warmly welcomes the Bill which strengthens the rights of children and young people, will ensure rights are part of law and decision making at all levels and that rights are enforceable by the courts.

Incorporating international human rights treaties into domestic law is a critical component of securing their realisation. Multiple United Nations Committees, including the Committee on the Rights of the Child, have repeatedly called on the UK to incorporate the treaty standards into our domestic laws.¹ Scotland will now be the first part of the UK to do this to the maximum extent possible within devolved competence with regard to children's rights. In doing so it will follow in the footsteps of many other jurisdictions around the world including Norway, Belgium, Spain and most recently Sweden. This process will also pave the way for the further incorporation of other international human rights treaty standards.

We commend the efforts of Ministers and government officials who have worked with, and listened to, the many children and young people and other actors in the children's rights sector across Scotland in order to bring this Bill forward.

The "maximalist" approach taken to the Bill, which protects children's rights to the highest degree possible within devolved competence, is welcome. It ensures there are no unintended gaps in protection or dilution in standards in the Bill.

Overall, and subject to the comments below, the Commission is highly supportive of this legislation and the outcomes it seeks to achieve.

In responding to this consultation the Commission is mindful of the importance of this legislation as a potential model for the incorporation of a broader range of internationally protected rights into domestic law in Scotland. The Commission is represented on the National Taskforce on Human Rights Leadership which is due to publish recommendations at the end of March next year. The development of a new human rights framework law for Scotland which includes not only civil and political but

also economic, social, cultural and environmental rights, as well as rights for women, disabled people, black and minority ethnic groups, LGBTI people and older people, will set out further obligations on public bodies. There will need to be coherence and alignment between the duties and obligations provided for in this Bill and the proposed broader framework in order to secure sustained and meaningful implementation in practice.

1.1. Access to Justice

The policy intention of the Bill is considered to be two-fold- to ensure that children's rights are built into the fabric of decision making in Scotland, and that the rights can be enforced in the courts. The Commission considers both of these objectives to be important and mutually reinforcing in the furtherance of a human rights culture in Scotland.

The removal of barriers to accessing rights and accessing justice for children and young people are both welcome and necessary.

It is noted by the Committee on the Rights of the Child "States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. Where rights are found to have been breached, there should be appropriate reparation, including compensation.'²

The Commission recommends further consideration is given to access to justice support for children and young people as part of the implementation of the Bill. For example, by setting out more detail on this under the Children's Rights Scheme (see answer to question 7 below). It could also be addressed through guidance to public bodies on accessible and available information, advocacy and complaints systems and including this as part of the reporting duties.

1.2. Rights-based policy and practice

Accessing rights however, is not only about when things go wrong and redress is sought. We share the belief that access to rights should also be about implementation in policy and practice in order to prevent violations before they occur. The focus of the Bill in securing implementation in this way is most welcome. For example, through the publication of the Children's Rights Scheme and public body reporting duties. The Scheme, reporting duties, Impact Assessments and government commitment to support guidance and toolkits for public bodies represent proactive measures to widen access to rights and strengthen everyday accountability.

2. What do you think about the ability to take public authorities to court to enforce children's rights in Scotland?

2.1. Duties and rights-based decision making

The Bill places public authorities under a duty not to act incompatibly with the UNCRC requirements, and provides legal remedies should they fail to do so (Part 2). This approach follows that taken in the Human Rights Act 1998 (HRA) (section 6) where it is unlawful for a public authority to "act in a way which is incompatible" with the rights in the ECHR and also in the Scotland Act 1998 where Scottish Ministers may not act incompatibly with ECHR rights. In the context of the HRA the section 6 provision is considered central in driving a culture of rights within bodies and ensuring they are held to account where rights are breached.

It was recognised by the First Minister's Advisory Group on Human Rights Leadership (FMAG),³ as well the CYPCS/ Together Advisory Group proposals⁴ which preceded this Bill, that it is considered desirable to have both a "duty to comply", or duty not to act incompatibly, as proposed, as well as a "duty to have due regard" to the rights. It was considered that this provides clarity as to obligations of conduct or process (duty to have due regard), as well as those of result or outcome (compliance duty), thereby strengthening the practical implementation of children's rights. The experience in Wales of the Rights of Children and

Young Persons (Wales) Measure 2011 shows that a due regard duty did have an impact in promoting rights-based decision making.⁵

Whilst this Bill provides for explicit proactive measures to secure rights-based decision making (Scheme, reporting, impact assessment), nevertheless it is arguable the additional process duty, to have due regard to the rights in decision making, strengthens the regime under the Bill in practice.

It is important to recognise and take into account the experience of the Human Rights Act 1998 (HRA) in embedding human rights in practice. Whilst the HRA section 6 compatibility duty has been a powerful catalyst for public bodies to embed human rights in practice, it has not been deemed to do so as systematically as desired. The reported experience of the Equalities Act 2010 and due regard duty, on the other hand has been that it has at times been considered overly procedural in nature and not outcomes focussed enough in practice⁶. A hybrid approach in this legislation would draw on the strengths, and avoid the pitfalls, of each. This would have the aim of advancing how public bodies approach rights-based decision making, building child's rights considerations into their processes, to secure rights based outcomes for children and young people.

Furthermore the Commission would welcome further consideration of whether the negatively framed duty to not act incompatibly with the rights would benefit from reframing as a more positive duty to comply. Given many of the rights being incorporated are socio-economic in nature and encompass proactive obligations to take steps to fulfil the rights, a duty to comply is arguably better aligned with the obligations drawn from international law and may secure stronger implementation in practice.

The Commission welcomes the compliance requirement, however we think this could be further strengthened by an additional and connected "duty to have due regard". Whilst in legal terms this supplementary duty may not be necessary to secure a courts assessment of whether decision making was rights-based, it would give further clarity to public bodies as to the proactive nature of their

obligations. This would assist to secure rights-based decision making in practice and rights based outcomes for children and young people.

2.2. Public authority definition

Section 6 of the Bill provides that it is unlawful for a public authority to act in a way which is incompatible with UNCRC requirements. For the purposes of section 6, a “public authority” includes the Scottish Ministers; a court or tribunal; or “any person certain of whose functions are functions of a public nature”. Section 6(4) provides that a person is not a public authority if the nature of the act is private.

The Bill therefore takes the same approach as in the Human Rights Act 1998. “Core” public authorities, such as local authorities and health boards, will be obliged to comply with UNCRC requirements. So, too, will private bodies when they are exercising functions of a public nature.

The Commission strongly supports the position that the Bill should apply to private actors when they are exercising functions of a public nature. It is a well-established principle of international law, including the UN CRC, that the state cannot divest itself of its human rights obligations by outsourcing or delegating those responsibilities to private organisations or individuals, that the conduct of those actors can engage state responsibility, and that those private actors have human rights responsibilities.⁷ If Scotland is to fulfil its international obligations it must ensure accountability gaps do not persist through the contracting out of services which are not caught by the definition of public functions provided for in the Bill.

2.2.1. Why is the definition important?

Ensuring that, where appropriate, the activities of private actors are brought within the scope of the Bill is critical given the number of public services that are currently outsourced to the private or voluntary sectors. Since the 1970s, there has been an upsurge in private sector involvement in the delivery of public sector services. There are now private markets for public services that simply did not exist 30 or 40 years ago, including prisons, probation services and support for unemployed people to return to work.⁸ The children’s sector has flagged

that this may be particularly relevant in relation to for example, private housing providers, childcare, private foster care and private schools.

The policy memorandum states:

“The definition of “public authority” in the HRA has been applied by public bodies and the courts for over 20 years and case law has developed which the Scottish Government considers provides a helpful and stable basis on which to base the definition in the Bill.”

The Commission does not agree with the analysis of the Policy Memorandum to the Bill that the case law developed by the courts on the meaning of the phrase “functions of a public nature” (s. 6 HRA) provides a helpful and stable basis on which to base the definition in the current Bill. On the contrary, the Commission, alongside other legal commentators, believes the courts’ interpretation of s.6 HRA has created a great deal of uncertainty as to the situations in which the Human Rights Act applies and believes the law in this area is in need of urgent clarification.

Uncertainty over the application and scope of human rights legislation not only creates unintended and unequal outcomes for individuals; it also undermines the vision that human rights should be central to public service delivery. Those involved in the delivery of public services, whether they are a “core” public authority or a private party, must be clear what their obligations are, and accept those obligations. Similarly, in delegating responsibilities to private parties, “core” public authorities should be confident and explicit about where human rights responsibilities rest before concluding service delivery agreements with third parties.

The Commission cautions that if an identical approach to the HRA is taken in the present Bill, uncertainty will remain. The Bill presents an opportunity to provide clarity and guidance on the question of what constitutes delivery of a public function and the opportunity to mitigate against unintended accountability gaps in the future. This would be in keeping with the ambition to take a maximalist approach to deliver the strongest protection for children’s rights.

2.2.2. The courts' approach to interpretation

The courts have largely adopted a narrow and restrictive approach to the interpretation of the phrase “functions of a public nature” contained in s. 6(3)(b) HRA.⁹ In the leading case of *YL v Birmingham City Council*¹⁰ the House of Lords opted to follow the restrictive line take in previous case law and held that a care home was not exercising “functions of a public nature”. Some of the key factors in its decision were that the care home had no statutory powers; its activities would not be amenable to judicial review; and the care home itself was not publicly funded.¹¹

Similarly, in the recent case of *Ali v Serco*¹² the Inner House of the Court of Session did not accept that Serco, contracted by the UK Government to provide accommodation and essential services to asylum seekers, was performing functions of a public nature under the HRA. The Inner House’s reasoning, drawing heavily on *YL*, focused on the status of Serco as a private party rather than focusing on the nature of the functions they were carrying out.¹³

The courts’ interpretation of s. 6(3)(b) reveals an approach which considers the institutional character of a body, for example that they are a for-profit company, rather than the nature of the function being performed by that body. This is in conflict with the intention of Parliament and Government during the passage of the Human Rights Bill through Westminster. For example, the then Home Secretary and then Lord Chancellor both made it plain that privatised or outsourced public services were to be brought within the scope of the Act by s. 6(3)(b).¹⁴ Although the precise scope of s. 6(3)(b) was left to the courts, Parliament’s intention was that the assessment should be based on the nature of the function being performed, rather than the legal status or form of the body itself.¹⁵

2.2.3. How could the HRA definition be improved?

The Joint Committee on Human Rights (“JCHR”) have twice looked in detail into the meaning of the terms “public authority” and “functions of a public nature” under s.6 of the Human Rights Act 1998. Reports released in the 2003-04 and 2006-07 sessions each expressed serious

concerns and noted that a gap in human rights protection had been created by the courts' restrictive interpretation of s.6 HRA.¹⁶

In their reports, the JCHR considered several possible options to remedy the situation. The Commission believes there is potential for adopting a mix of these options which would significantly strengthen the approach taken to the incorporation of the UNCRC.

Strengthen the definition of public authority in the Bill

The JCHR posed that there was a strong case for separate, supplementary legislation directed at clarifying the interpretation of s.6 HRA. The JCHR suggested the following wording, which the Commission believes could be drawn upon to strengthen the definition of public functions in the current Bill:

*“For the purposes of s. 6(3)(b) of the Human Rights Act 1998, a function of a public nature includes a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform the function”.*¹⁷

Develop interpretative guidance to accompany the Bill

Much of the difficulty created by s.6 HRA lies not in the wording of the legislation, rather in the restrictive interpretation adopted by the courts. The Commission suggests that guidance as to the meaning of public authority could be developed, which should be taken into account by the courts when tasked with deciding whether a body is required to comply with UNCRC requirements. The guidance would also offer clarity for different bodies when they look to understand their own obligations under the Bill.

The Commission suggests that the dissenting opinion of Lady Hale in the *YL* case could form a strong basis for any guidance. Lady Hale set out the following factors which would point to a function being of a public nature for the purposes of the Human Rights Act. While the following list is flexible and non-exhaustive, the Commission believes the following factors should be highly relevant in determining whether a public function is being performed:

- Whether the state has assumed responsibility for seeing that the task is performed;
- Whether there is a public interest in having the task undertaken;
- The existence of public funding for the task. Providing a service to members of the public at public expense;
- Whether the function involves or may involve the use of statutory coercive powers; and
- The close connection between a service and the core values underlying Convention rights (in this case, UNCRC rights) and the risk that rights will be violated unless adequate steps are taken to protect them.

As set out above, the courts' interpretation of s.6 HRA to date has focused on the nature or character of the body performing a function. The *YL* and *Serco* cases arguably went further and looked at the motivation for the body's existence. The Commission believes that the fact a body exists for profit is entirely irrelevant in considering whether it performs functions of a public nature. The pivotal matter is whether the act or conduct at issue may be attributed to the state. Guidance could be used to clarify the types of considerations that are not relevant to deciding on whether a function falls within the ambit of the Bill.

Guidance could also include illustrative examples of the types of functions and settings the Bill should apply to. The nature of contracting out and private sector involvement in public service delivery is ever evolving and expanding; therefore the Commission believes the option of creating prescriptive and specific lists of bodies, or functions, considered to be public within the Bill itself would soon be out of date and could add to confusion. That said, illustrative, non-exhaustive lists of functions where the Bill applies could be helpfully included in guidance.

Link to future legislation

The JCHR considered that a way to begin to address the problems created by the courts' interpretation of s.6 HRA would be to ensure that future Bills providing for the contracting-out or delegation of public functions identified clearly that the body performing the functions was a

public authority for the purposes of the HRA. The Commission believes any future legislation of the Scottish Parliament that delegates public functions should clearly express any intention that the body concerned will be considered a public authority under the present Bill.

Public procurement and contractual terms

Another area considered by the JCHR was the inclusion of explicit contractual terms in Government contracts, making clear that a private body is performing public functions. The Commission believes this approach should be adopted in Scotland under the present Bill, and that the Scottish Government should consider producing separate procurement guidance specifically addressing contracting out in the context of the UNCRC Bill and its broader commitment to embed human rights in delivery in Scotland. Various flaws with UK Government procurement guidance relating to the HRA were highlighted by the JCHR, and the Scottish Government should be mindful to avoid recreating these in Scottish guidance.

Given the longstanding and ongoing lack of clarity regarding the definition of those performing public functions under the HRA 1998 steps must be taken to ensure unintended accountability gaps do not arise under this Bill. The Commission recommends careful consideration be given to a strengthened definition of public functions, supported by guidance and that the guidance links to any future legislation which delegates public functions.

3. What more could the Bill do to make children's rights stronger in Scotland?

3.1. Interpretative provision

Section 4 of the Bill provides that courts may take into account provisions of Part 1 of the Convention, the first optional protocol and the second optional protocol as well as the preamble to the Convention in its interpretation of UNCRC requirements. The Commission believes this should be built upon and strengthened to ensure Scotland keeps pace with the highest standards of protection internationally.

One of the advantages of the direct incorporation model taken by the Bill is that the formulation of the CRC rights is identical to that of the international treaty and therefore also the directly incorporated CRC rights in other jurisdictions around the world. This means that there are both international and comparative sources of interpretative guidance on the meaning and content of the rights available to both public bodies and courts alike.

However as it stands the Bill does not seek to direct the courts to these sources of interpretative guidance. The Commission is of the view that in order to fulfil the ambition of using the CRC as the “gold standard” in children’s rights and ensure that Scotland “keeps pace” with developments in international law that a direct link should be made to international human rights law and guidance on interpretation of the CRC standards.

The domestic courts are accustomed to drawing on international sources to aid interpretation. Indeed Section 2 of the HRA identifies courts and tribunals must take into account decisions of, *inter alia*, decisions of the European Court of Human Rights when determining an issue in connection with an ECHR right.

In discussing the incorporation of economic and social rights, James Wolffe QC, the now Lord Advocate, has said “...*if that step is taken, lawyers and courts will learn the necessary techniques – just as they have with the Convention [ECHR]. Domestic courts have, in recent years, been more used to dealing with a range of international materials than they were in the past – and, indeed, may have to do so when they apply EU law and interpret Convention rights*”.¹⁸

Whilst General Comments are not binding sources of law they nevertheless provide invaluable and authoritative interpretative analysis of how to give substance to rights contained in the Bill. Courts are well equipped to take these non-binding sources into account and give them appropriate weight within their reasoning. In 2016 Lord Boyd referenced the work of international bodies stating “*the reason that international bodies such as the UNHCR are accepted as authoritative is because of the breadth of their knowledge and experience...[Their views] will be*

taken seriously by governments, other international agencies, courts and tribunals as well as in the court of public opinion. Their views and opinions enjoy confidence and respect.”¹⁹

Further to this it can be seen in recent years how courts already have regard to unincorporated international treaty provisions, and General Comments, as important sources of law and interpretative resources.²⁰ For example, in a case before the Supreme Court challenging the benefit cap the court cited the UNCRC protection of the best interest of the child and referred to the General Comment 14 of the Committee on the Rights of the Child as providing “authoritative guidance”²¹. However this is not a routine approach for the courts and appropriate signposting on the face of this Bill would therefore be most welcome.

The First Minister’s Advisory Group on Human Rights Leadership (FMAG) recommended that “There must be an obligation on courts and tribunals when interpreting the rights to have regard to international law (including the UN treaties, treaty body decisions, General Comments and recommendations). It should also state that they may have regard to comparative law.”

The Commission strongly believes that the interpretative provision of the Bill in Section 4 should be expanded to state courts shall have regard to the following:

- UN Committee on the Rights of the Child General Comments;
- General Comments from other UN treaty body Committees which are relevant to children and young people;
- UN Committee on the Rights of the Child Concluding Observations on the UK, and the Concluding Observations of other UN treaty Committees which are relevant to children and young people’s rights;
- Relevant decisions issued under the Communications Procedure under Optional Protocol 3 of the CRC;
- Judgments, decisions, declarations or advisory opinions of the European Court of Human Rights, among other sources, recognising

that Article 41 of the Convention provides that if there is a higher standard set within domestic law or international law, then this should prevail;

Additionally courts may have regard to:

- Comparative international jurisprudence, as relevant.

4. If you work for an organisation or public authority, what resources do you need to help children and young people access their rights? Will you require additional resources or training to implement the Bill, for example to make or respond to challenges in court?

4.1. Guidance, Training and Capacity Building

The Commission believes that for meaningful and sustained culture change in policy and decision making suitable capacity building, resources and training are required to support public bodies. The United Nations Declaration for Human Rights Education and Training recognises that there is an obligation on states to secure this capacity building across all sectors.²² The FMAG recommended in relation to a new, broadened human rights framework, “Capacity-building to enable effective implementation of the Act so as to improve people’s lives.”

The Commission’s experience over 11 years has been that without an embedded understanding of rights at every level within public bodies, including in leadership and senior management, processes such as that of impact assessment, can lack the transformative potential we all seek.²³

The development of capacity building and guidance must be carried out in a participatory way with child’s rights expertise at its heart. It should also be closely aligned with the development of capacity building arising as part of the National Taskforce recommendations. Furthermore it must recognise the critical role of Parliament in securing implementation of the Bill in particular through the scrutiny of future legislation. There is an ongoing need to build human rights capacity, including in relation to children’s rights, across the Parliament in alignment with the

recommendations of the Committee's Inquiry findings in its report Getting Rights Right²⁴.

4.2. Powers to raise proceedings and the Scottish Human Rights Commission

The Children and Young Persons Commissioner for Scotland (CYPCS) has a central role in both promoting and enforcing the rights set out in this Bill. However, in order to further secure rights in practice and accountability for failures to implement it would be valuable to widen the powers granted to raise judicial proceedings by extending the power to the Scottish Human Rights Commission, Scotland's National Human Rights Institution.

A main thrust of this Bill is the creation of a proactive culture of accountability, ensuring children's rights are protected, respected and fulfilled in an upstream way in law, policy and decision making. This is most welcome, as discussed elsewhere in this submission. However, the Commission is of the view that it is also important, and indeed a fundamental principle of human rights law, that there is accountability for failures to uphold rights and redress for violations should they occur. The adjudication of the rights also has an important role in deepening understanding and awareness and further galvanising a rights culture of decision making and accountability. Whilst therefore, we might not expect a large number of cases to be taken before the courts²⁵, it is essential that cases are brought which address both individual circumstances as well as issues of a systemic nature.

The Bill gives the CYPCS powers to raise judicial proceedings, or intervene in proceedings, where a public authority has acted incompatibly with UNCRC requirements (section 10). This is very welcome in recognising the need for strategic public interest litigation to address systemic issues and to advance the rights of children and young people. It is also welcome in recognition of the many barriers that children and young people may face in raising proceedings.

The proposals on incorporation by the CYPCS and Together's Advisory Group on Incorporation set out that the Commission would also assume a power to raise proceedings.²⁶ The Scottish Government 2019

consultation also asked for views on this. The Commission would support amendment to the Bill to grant us such a power, supplementing its existing intervention power. As the accredited National Human Rights Institution of Scotland, with a mandate covering all rights and protected groups, it is highly anomalous that the Commission does not already have such a power in relation to human rights proceedings.²⁷

We believe that given the limited number of cases likely to be brought before the court, the broad range of issues within the scope of the Bill and the scale of resource, even where enhanced, available to either CYPCS or SHRC, that there is value in the Commission having such a power under this Bill. This would allow for different issues to be brought before the courts depending on the strategic priorities and differing interests of the 2 institutions.

There is provision in our legislation that the “Commission must seek to ensure, so far as practicable, that any activity undertaken by it under this Act does not duplicate unnecessarily any activity undertaken by any other person under any other enactment.”²⁸ The Commission operates under a Memorandum of Understanding with the Equalities and Human Rights Commission Scotland to ensure alignment and non – duplication. Should both the CYPCS and SHRC be granted the same power to raise proceedings in relation to the rights contained in the Bill we would similarly seek to operate under such a Memorandum of Understanding and in keeping with our legislative non-duplication requirement.

Whilst we agree fully with the CYPCS that raising proceedings is a matter of last resort and unlikely to become a dominating feature of the work of either body we also believe the practical ability to use the power is imperative for the reasons set out above. The Commission’s recent experience of intervening in proceedings in the case of *Ali v Serco*²⁹ highlighted the resource implications of involvement in judicial proceedings. For this reason, should such a power be granted to the Commission we would require additional funding to ensure the power is more readily able to be used in practice.

5. Are there any relevant equalities and human rights issues related to this Bill, or potential barriers to rights, that you think we should look at?

The experience of the COVID-19 pandemic to date has shown in the starkest of ways how the rights of all of us are interconnected and how our intersectional identities impact on how we experience the world. The children worst impacted by the pandemic have undoubtedly been disabled children, children already living in poverty and children already accessing support. The rights of children are also seen to be interdependent of the rights of their carers and families, and, often the rights of women.

The work of the National Taskforce on Human Rights Leadership will seek to reflect this. The Taskforce is currently developing recommendations on a new human rights framework for Scotland which draws on a range of international standards, including economic, social, cultural and environmental. It will also consider protections for women, disabled people, black and minority ethnic groups, LGBTI people and older people.

The Commission considers that all of these protections will be highly relevant for the lives of children and young people. Furthermore there will require to be a close interrelationship between the legal regime protecting these rights and that proposed under this Bill. For this reason regard must be had to the implications of the provisions of this Bill for the development of a broader framework, and the need for coherence between the legislative developments.

6. What are your views on the provisions in the Bill that allow the courts to strike down legislation judged to be incompatible with the UNCRC?

The Commission supports the approach taken in the Bill that courts are enabled to make a strike down declaratory (akin to ultra vires declaration under section 29 Scotland Act 1998) where legislative provisions are incompatible and they pre-date the UNCRC Act (section 20) and can make an incompatibility declaratory where the provision post-dates the UNCRC Act. This appears to be in accordance with legislative

competence of the Parliament. Importantly it is also supported by further measures to secure compliance so as to ensure an effective remedy is provided for in practice. The Policy Memorandum sets out how this includes Child Rights and Wellbeing Impact Assessment (CRWIA), statements of compatibility, the requirement on Ministers to report following a strike down declarator made by the courts, and the remedial power. Viewed as a whole, in conjunction with these other measures, therefore these powers go some way to provide for an effective remedy under the legislation.³⁰

As part of the Commission's work as a member of the Taskforce we are giving further consideration to what more can be done to develop appropriate remedies for the newly incorporated rights. For example, the issue of what constitutes an effective remedy when it comes to economic, social and cultural rights violations has been a recurrent theme in discussions and gives rise to several issues that would be relevant for children. We consider that there is potentially a need to look beyond existing remedies in Scots law and evolve new remedies suited to the types of breaches the new framework may encounter where there are multiple actors and systemic structural issues to address.³¹ This is work we will seek to advance through the recommendations of the Taskforce over coming months and may be relevant to the development of this Bill. For example, consideration as to whether a recognition of the right to an *effective* remedy would be appropriate on the face of the Bill to secure a progressive and international law compliant approach to remedy.³²

7. What are your views on the Children's Rights Scheme and the requirement on public authorities to report?

The requirement for Scottish Ministers to publish a Children's Rights Scheme, and to report on both steps taken and planned, is an important means of ensuring children's rights are being advanced by government in practice. The reporting obligations on listed public bodies also advance this objective of securing a child rights-based culture change in public bodies. The Commission considers inclusion of the Children's Rights Scheme a very welcome evolution and innovation from the HRA model of incorporating rights which is more proactive in driving a human rights culture in public bodies.

It also very welcome that the Scheme is mandated to take account of reports and documentation of the United Nations Committee on the Rights of the Child (section 12(2)). Furthermore in reviewing and reporting the Scheme is to take account of such documentation, amendments to the Convention, General Comments and incompatibility declarations of the Court (section 13(3)). This should also explicitly include decisions made under the third optional protocol.

Nevertheless this is an important provision in recognition of the need for stronger follow-up procedures with regard to implementation of Concluding Observations and recommendations of the UN Committee on the Rights of the Child. The need for more systematic follow-up on UN treaty body recommendations was explicitly acknowledged as part of the Inquiry Report of the Equalities and Human Rights Committee into the role of Parliament as a human rights guarantor.³³

Section 11(3) sets out what “may” be included in the scheme, including, the participation of children in decision making, raising awareness and promotion of children rights, consideration of children’s rights in the budget process, ensuring actions relate to national outcomes for children and the preparation of Childs Rights and Wellbeing Impact Assessments.

The Commission recommends the list of what may be included in the Scheme is expanded to include arrangements for the Scottish Ministers to improve children and young people’s access to justice through child-friendly complaints mechanisms, access to advocacy and representation. It should also go beyond awareness raising and promotion and make reference to advancing human rights education and training.

8. Is there anything else you want to tell us about the Bill?

There is no commencement date on the face of this Bill, rather commencement is left to the discretion of Ministers. The Financial Memorandum provides for a 3 year implementation period.

The work of the FMAG recognised that duty bearers may require a period to prepare for the coming into force of new obligations and

recommended the mechanism of a sunrise clause to lead from a “due regard duty” to a “duty to comply” duty to account for this. However, given that public authorities have had duties placed upon them under the Children and Young People (Scotland) Act 2014, which include reporting duties in 2020, the Commission considers that there is arguably less need for any postponement of the commencement of the compliance duty in this Bill.

The Commission recommends that a commencement date is provided for on the face of the Bill to ensure clarity for children and young people as well duty bearers as to the rights and obligations provided for. Commencement should be as immediate as possible.

¹ UN Committee on the Rights of the Child (2002). [Concluding Observations: United Kingdom of Great Britain and Northern Ireland](#), paras 8-9; UN Committee on the Rights of the Child (2008). [Concluding Observations: United Kingdom of Great Britain and Northern Ireland](#), paras 10-11; UN Committee on the Rights of the Child (2016). [Concluding Observations: United Kingdom of Great Britain and Northern Ireland](#), paras 79(a).

² The Committee on the Rights of the Child, 2003, 'GENERAL COMMENT No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6) CRC/GC/2003/5
27 November 2003

³ First Ministers Advisory Group on Human Rights Leadership (2018); Recommendations for a new human rights framework to improve people's lives

⁴ See work of the Incorporation Advisory Group (2018) - <https://www.togetherscotland.org.uk/about-childrens-rights/monitoring-the-uncrc/incorporation-of-the-un-convention-on-the-rights-of-the-child/>

⁵ Hoffman (2018) The impact of Legal Integration of the UN Convention on the Rights of the Child in Wales, Report for EHRC

⁶ Equality and Human Rights Commission Research report Effectiveness of the PSED Specific Duties in Scotland, (2018), p51, <https://www.equalityhumanrights.com/sites/default/files/effectiveness-of-psed-specific-duties-scotland.pdf>

⁷ In the context of ECHR rights, see, for example, *Costello-Roberts v UK* (1993) 19 EHRR 112. See also Committee on the Rights of the Child, General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights, 2013. On the attribution of the conduct of private actors to states in international law generally, see [Report of the International Law Commission](#), 53rd Session A/56/10 Ch.IV; UNGA re 56/83 (10 December 2001), available at pp.42-3.

⁸ House of Commons Public Administration and Constitutional Affairs Committee, *After Carillion: Public sector outsourcing and contracting*, 7th report of Session 2017-19.

⁹ A full discussion of the case law is beyond the scope of this paper ; however, see key cases of *Poplar Housing and Regeneration Community Association v Donoghue* [2001] EWCA Civ 595; *R (on the application of Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 595; *R (on the application of Beer t/a Hammer Trout Farm) v Hampshire Farmers Markets Ltd* [2003] EWCA Civ 1056. See notable exception of *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37 where the House of Lords afforded a wider interpretation.

¹⁰ [2007] UKHL 27

¹¹ After the restrictive approach taken in *YL*, the UK Government introduced an amendment to the Health and Social Care Bill to explicitly state that where a private or voluntary sector care home provides care and accommodation under arrangements with a local authority, it would be exercising functions of a public nature for the purposes of the HRA. Section 145 of the Health and Social Care Act 2008 was repealed in 2014.

¹² *Shakar Omar Ali v Serco Limited, Compass SNI Limited, Secretary of State for the Home Department; Lana Rashidi v Serco Limited, Secretary of State for the Home Department* [2019] CSOH 34.

¹³ *Ibid* at paras 52-57.

¹⁴ See, for example, Home Secretary, HC Deb, 16 Feb 1998, col 773.

¹⁵ The then Home Secretary said: "As we are dealing with public functions and with an evolving situation, we believe that the test must relate to the substance and nature of the act, not to the form and legal personality." Home Secretary, HC Deb, 17 June 1998, col 433.

¹⁶ Joint Committee on Human Rights, 'The Meaning of Public Authority under the Human Rights Act', 7th report of Session 2003-04 at pg. 6.

¹⁷ Joint Committee on Human Rights, 'The Meaning of Public Authority under the Human Rights Act', 9th report of Session 2006-07 at para. 150.

¹⁸ Wolffe (2014) Economic and Social Rights in Scotland: Lessons from the Past; Options for the Future: A lecture for International Human Rights Day 2014

¹⁹ Lord Boyd para. 81 IMI, MG & EA, Re Judicial Review [2016] CSOH 102.

²⁰ See, for example, *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.

²¹ See *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, see [105-106]; *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, see [41]).

²² UN Declaration on Education and Training - <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/467/04/PDF/N1146704.pdf?OpenElement>

²³ See for example, project work on integrated Equalities and Human Rights Impact Assessment and 10 Good Practice Building blocks <http://eqhria.scottishhumanrights.com/eqhriagoodpractice.html>-

²⁴ Equalities and Human Rights Committee, *Getting Rights Right: Human Rights and the Scottish Parliament*, 6th Report, 2018 (Session 5)

²⁵ See for example, research published by the HRCS (2018) - Discussion Paper: Overcoming Barriers to Public Interest Litigation in Scotland

²⁶ Incorporation Advisory Group (2018) - <https://www.togetherscotland.org.uk/about-childrens-rights/monitoring-the-uncrc/incorporation-of-the-un-convention-on-the-rights-of-the-child/>

²⁷ See, for example, European Union of Fundamental Rights Agency, (2018), *Strong and effective national human rights institutions – challenges, promising practices and opportunities*

²⁸ s5(2) The Scottish Commission for Human Rights Act 2006

²⁹ *Shakar Omar Ali v Serco Limited, Compass SNI Limited, Secretary of State for the Home Department; Lana Rashidi v Serco Limited, Secretary of State for the Home Department* [2019] CSOH 34.

³⁰ In an ECHR context to meet the threshold of an effective remedy there has to be 'long-standing and established practice' of giving effect to the courts' declaration of incompatibility by remedying the incompatible legislation, *Burden v UK* Application No 13378/05, Judgment, 12 December 2006

³¹ Boyle (2017); *Models of Incorporation and Justiciability Report for SHRC*

³² In a CRC context see UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): *General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5

³³ Equalities and Human Rights Committee, *Getting Rights Right: Human Rights and the Scottish Parliament*, 6th Report, 2018 (Session 5)