

## **United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill – Stage 2 Briefing – Definition of “public authority”**

**9 February 2021**

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## Summary

1. This is a briefing ahead of the Equalities and Human Rights Committee's (the "Committee") consideration of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (the "Bill") at Stage 2. We have focused our analysis on section 6 of the Bill, particularly around the definition of the term "public authority".
2. Section 6 places a duty on public authorities, including private bodies exercising "functions of a public nature", to act compatibly with UN CRC requirements. The drafting of section 6, as introduced, mirrors the Human Rights Act 1998 ("HRA"). The courts' interpretation of the mirroring provision in the HRA has been restrictive, which has created a great deal of uncertainty as to the situations in which the HRA applies. At Stage 1, the Commission cautioned that simply replicating the HRA definition would lead to further confusion in this area.
3. The Commission therefore strongly supports Scottish Government amendment 9, which will ensure that functions carried out either under contract or another arrangement with a public authority will be covered by the Bill. Notwithstanding that amendment 9, if agreed, is a positive development, the Commission believes that an accountability gap may still arise where functions are not funded by or otherwise arranged with the state but those functions still strike at the core of a right protected by the UN CRC. The Commission therefore supports the intention of amendments 9A and 9B, which seek to address this issue. Finally the Commission believes that guidance as to the types of functions intended to be covered by section 6 is needed to provide further clarity and certainty as to the scope of the provisions; this guidance would be directed at those bodies with obligations under the Bill but would also be useful for courts when they come to interpret section 6.
4. As the Committee is aware, the National Taskforce for Human Rights Leadership is currently working to establish

recommendations for a statutory framework incorporating a wider range of international human rights standards into Scots Law. The definition of “public authority” is not only of paramount importance in the present Bill, but will require careful consideration under any new framework legislation to ensure all public functions are appropriately within scope of the legislation.

## **Public authority definition**

5. Section 6 of the Bill as introduced provides that it is unlawful for a public authority to act in a way which is incompatible with UN CRC 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.
6. The Bill as introduced has taken the same approach as the HRA. “Core” public authorities, such as local authorities and health boards, will be obliged to comply with UN CRC requirements. So, too, will private bodies when they are exercising functions of a public nature.
7. The Commission strongly supports that the Bill should apply to private actors when they are exercising functions of a public nature. It is a well-established principle of European human rights law, and of 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.<sup>1</sup> The UN Guiding Principles on Business and Human Rights also highlight the state’s obligation to protect against human rights abuses by

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<sup>1</sup> 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.

third parties and the obligation on all business enterprises to respect human rights.<sup>2</sup>

## **Why is the definition important?**

8. At Stage 1, the Commission expressed concern that section 6 of the Bill as introduced had been drafted to mirror the HRA with no further detail on interpretation of the phrase “functions of a public nature”. The Commission highlighted that the courts’ interpretation of section 6 HRA has created a great deal of uncertainty as to the situations in which the HRA applies.
9. The Commission made clear that 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, “core” public authorities should be confident and explicit about where human rights responsibilities rest before concluding service delivery agreements with third parties. The Commission urged the Scottish Government to take the opportunity to provide clarity and guidance on this issue.

## **Amendments at Stage 2**

### **Amendment 9**

10. The Commission strongly supports amendment 9, which provides that the phrase ““functions of a public nature” includes, in

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<sup>2</sup> UN Guiding Principles on Business and Human Rights, available at: [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

particular, functions carried out under a contract or other arrangement with a public authority”. By providing that those bodies or individuals carrying out functions under contract or other arrangement with the state will be required to act compatibly with UN CRC requirements, the Commission believes this amendment will go a long way to addressing the considerable uncertainty that has arisen following key cases such as *YL v Birmingham City Council*<sup>3</sup> and, more recently, *Ali v Serco*.<sup>4</sup> This amendment will ensure that those standing in the shoes of the state will have obligations to comply with UN CRC requirements and, importantly, will provide a direct remedy for individuals should rights violations occur. Notwithstanding this important strengthening of the Bill, the Commission still considers that an accountability gap may emerge if further provision is not made.

## Amendments 9A and 9B

11. The Commission therefore also supports amendments 9A and 9B, which provide that the phrase “functions of a public nature” would include functions, “the core purpose of which is the provision of services which fulfil the rights set out in the UN CRC requirements, regardless of how the service is funded”. The Commission believes these amendments are necessary as they address an accountability gap that could arise in relation to functions that are not funded by or made under other

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<sup>3</sup> [2007] UKHL 27.

<sup>4</sup> *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. 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 to s. 6 HRA.

arrangement with the state, but nevertheless strike at the core of a right protected by the UN CRC.

12. In its Stage 1 evidence, the Commission highlighted that in the leading case of *YL v Birmingham City Council*, Lady Hale set out a flexible and non-exhaustive list of factors she believed would point to a function being of a public nature. A key factor, in the Commission's view, is the existence of a close connection between a service and the core values underlying Convention rights (in this case, UN CRC rights) and the risk that rights will be violated unless adequate steps are taken to protect them.
13. An example is the right to education, which is protected by Article 28 of the UN CRC. The Commission believes that, on a suitably wide interpretation of section 6 in line with the original intentions of the UK Parliament, independent schools, nurseries and childcare providers, should be considered as public authorities for the purposes of the HRA. The Commission believes the Bill should be amended to provide clarity that these types of scenarios – where there is no direct funding or other arrangement with the state, but where a UN CRC right is clearly impacted - are brought within the Bill's scope.

## **Further strengthening of the Bill**

14. Amendment 53 provides that public authorities to which section 6 apply must have regard to any guidance issued by the Scottish Ministers about the carrying out of their functions in a way which is not incompatible with UN CRC requirements. The Commission believes such guidance would be helpful in clarifying the obligations of public authorities; however, it also believes that further guidance around the types of functions that would be covered by section 6 of the Bill is needed. This accords with a key recommendation of the Joint Committee on Human Rights ("JCHR") who have twice looked in detail into the meaning of the

terms “public authority” and “functions of a public nature” under section 6 of the HRA.<sup>5</sup>

15. The Commission believes that much of the difficulty created by section 6 HRA lies not in the wording of the legislation, rather in the restrictive interpretation adopted by the courts. Guidance, directed at those who may have obligations under the Bill, should be developed. Whilst the guidance would not necessarily be directed at the courts, it could be referenced as a key interpretative tool when tasked with deciding whether a body is required to comply with UN CRC requirements when performing a certain function.
16. The Commission suggested at Stage 1 that the dissenting opinion of Lady Hale in the *YL* case could form a strong basis for any such guidance. Guidance could also be used to clarify the types of considerations that will not be relevant in deciding whether a function falls within the ambit of the Bill. The Commission suggests one such example would be that a function is performed by a body that exists for profit. Guidance could also include illustrative examples of the types of functions and settings the Bill should apply to.
17. The Commission hopes the above is helpful in assisting the Committee in its Stage 2 deliberations on the Bill.

## **Scottish Human Rights Commission**

**9 February 2021**

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<sup>5</sup> Joint Committee on Human Rights, ‘The Meaning of Public Authority under the Human Rights Act’, 7<sup>th</sup> report of Session 2003-04; Joint Committee on Human Rights, ‘The Meaning of Public Authority under the Human Rights Act’, 9<sup>th</sup> report of Session 2006-07.