

# **Equalities, Human Rights and Civil Justice Committee**

## **Children (Withdrawal from Religious Education and Amendment of UNCRC Compatibility Duty) Bill 2025**

### **Stage 1 Call for Evidence**

**1 September 2025**

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The Scottish Human Rights Commission ("SHRC") is a public body created by the Scottish Commission for Human Rights Act 2006.

We are an independent, expert body that works with and for the people of Scotland; we monitor, listen, speak up for all of our rights and respond when things go wrong.

The SHRC is also part of the international human rights system. It is accredited by the United Nations as its trusted organisation to provide impartial evidence on the enjoyment of human rights in Scotland.

The SHRC is independent of Government. We are accountable to the people of Scotland via the Scottish Parliament.

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## Executive Summary

The Scottish Human Rights Commission ("SHRC") welcomes the opportunity to provide our views on the Children (Withdrawal from Religious Education and Amendment of UNCRC Compatibility Duty) (Scotland) Bill ("the Bill"). The SHRC has a statutory duty under section 2 of the Scottish Commission for Human Rights Act 2006 ("SHRC Act") to promote awareness and understanding of human rights in Scotland. In particular, this duty includes encouraging human rights best practice. Pursuant to this duty, we wish to bring to the attention of the Committee our significant concerns about the Bill. The SHRC has sought to liaise with the Children and Young People's Commissioner Scotland ("CYPCS") to seek to ensure, so far as practicable, that our response does not unnecessarily duplicate work in accordance with our duty under section 5(2) of the SHRC Act. Accordingly, the SHRC's focus is on concerns which we consider to potentially have wider application to the protection and promotion of human rights.

The SHRC notes that the Bill has two key objectives, which are set out in Part 1 and Part 2 respectively. It is worth noting from the outset that the objectives of Part 1 and Part 2 are very different.

Part 1 of the Bill would amend the Education (Scotland) Act 1980 to create a process by which a child may be able to object to their parent's request to withdraw them from religious observance ("RO") or instruction in religious subjects. The SHRC raises three specific concerns about Part 1: the failure to implement a clear recommendation by the UN Committee on the Rights of the Child; the balancing of parent and child rights in this context; and the legislative drafting choice which means the proposed changes would be out of scope of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 ("UNCRC Act").

Part 2 of the Bill would amend the UNCRC Act to add a further carve out to the duty on public authorities to act in compliance with the UNCRC. Part 2 of the Bill goes to the heart of how the UNCRC Act provides remedies for human rights violations. It would reduce the options available for children and their representatives to seek remedies through the courts, thereby diluting the protection afforded to children by the UNCRC Act, contradicting the Scottish Government's purported "maximalist" approach to incorporation, and posing a significant risk to access to justice. We are concerned that the proposed change is indicative of the Scottish Government's approach to incorporation, not just in the UNCRC context, but also the potential incorporation of other international human rights treaties in the future. Should Part 2 progress despite these concerns, we suggest as mitigation that provisions are included in the Bill requiring the Scottish Government to regularly publish action

taken in response to potential legislative incompatibilities in order to increase transparency and accountability.

## Part 1 - Withdrawal from Religious Instruction or Religious Observance

The SHRC raises three specific concerns about Part 1: the failure to implement a clear recommendation by the UN Committee on the Rights of the Child (the "UNCRC Committee"), the balancing of parent and child rights in this context and the legislative drafting choice which means the proposed changes would be out of scope of the UNCRC Act.

The UNCRC Committee made the following recommendation in its 2023 UK Concluding Observations:

"Recalling its previous recommendations, the Committee urges the State party to guarantee the rights of all children to freedom of expression and to practise freely their religion or belief, including by...

Repealing legal provisions for compulsory attendance in collective worship and establishing statutory guidance to ensure the right of all children, including children under 16 years of age, to withdraw from religious classes without parental consent."

The Scottish Government acknowledges in its Policy Memorandum that Part 1 of the Bill does not implement the recommendation of the UNCRC Committee. In doing so, the Scottish Government highlights that such a recommendation is not binding.

While this recommendation is not binding, it is nevertheless authoritative. The UNCRC Committee is the body tasked with overseeing implementation of the UNCRC by States. The UNCRC Committee's General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence makes clear in respect of Article 14 UNCRC, read together with Article 5 UNCRC, that:<sup>1</sup>

"...it is the child who exercises the right to freedom of religion, not the parent, and the parental role necessarily diminishes as the child acquires an increasingly active role in exercising choice throughout adolescence. Freedom of religion should be respected in schools and other institutions, including with regard to choice over attendance in religious instruction classes..."

In this instance, the recommendation in the Concluding Observations is clear and specific and purports to give effect to the requirements of Article 14 UNCRC as clarified by the General Comment. While neither General Comments nor Concluding Observations are legally binding, they are of notable authority given that they are outputs of the body specifically tasked with ensuring implementation of the treaty.

The SHRC stresses that the child's right to freedom of religion in Article 14 UNCRC is subject to immediate, not progressive, realisation. Article 4 UNCRC recognises that economic, social and cultural rights require a State to work towards full realisation over time, based on the maximum resources available. However, full compliance with a civil right, such as Article 14 UNCRC, is expected immediately.<sup>2</sup>

Given this context, and the Scottish Government's stated commitment to furthering human rights in domestic law, we would have expected a more coherent and compelling explanation as to why the Scottish Government has failed to implement the UNCRC Committee's recommendation.

The Scottish Government has indicated in the Policy Memorandum that concern about the balance with parental rights is a reason for not even extending the proposed changes in Part 1 to circumstances where it is the child who wishes to withdraw. Part 1 proposes a balancing exercise where a child wishes to opt-in, but not when the child wishes to opt-out. The blunt prioritisation of the rights of the parent is maintained in these circumstances. The views of the child are not considered at all.

The SHRC recognises that the Scottish Government may be concerned with how the UNCRC interacts with the European Convention on Human Rights ("ECHR") in this context. To this end, we wish to highlight the following points:

- The ECHR is incorporated into the domestic law of Scotland via the Human Rights Act 1998 and the Scotland Act 1998. All Scottish legislation is required to be compatible with the ECHR and can be challenged in the Scottish courts on this basis.
- The Grand Chamber of the European Court of Human Rights has recognised the reciprocal and harmonious relationship between the ECHR and the UNCRC and has emphasised that the ECHR cannot be interpreted in a vacuum.<sup>3</sup>
- Both parents and children have rights under, for instance:
  - Article 8 ECHR - the right to respect for private and family life
  - Article 9 ECHR - the right to freedom of thought, conscience and religion
  - Article 2 of Protocol 1 ("A2P1") ECHR - the child's right to education and the parents' right to respect for their religious and philosophical convictions during their child's education.
- The European Court of Human Rights has recognised that when A2P1 is read as a whole, and in light of Article 9, it also guarantees school children

the right to education in a form which respects their right to believe or not to believe.<sup>4</sup>

- A2P1 is not an absolute right. It requires that the State ensures the curriculum is conveyed in an objective, critical and pluralistic manner. The limit which must not be crossed is the curriculum must not pursue an aim of indoctrination which might be considered as not respecting religious and philosophical convictions.<sup>5</sup>
- The Joint Committee on Human Rights took a view on this issue in 2006, noting that the failure to guarantee a child of sufficient maturity, intelligence and understanding the right to withdraw from religious education and collective worship was incompatible with the UK's obligations under Article 9 ECHR and Article 14 UNCRC.<sup>6</sup> Albeit this was expressed in relation to educational arrangements in England.
- The European Court of Human Rights has recognised that creating a system of withdrawal from RO or religious classes which risks parents feeling compelled to disclose intimate aspects of their own religious and philosophical convictions to the school authorities gives rise to concerns under Article 8 and can be relevant to determining whether there has been a violation of A2P1, when interpreted in light of Article 8.<sup>7</sup>
- The European Court of Human Rights acknowledges that there can be conflicts between rights and between rights-holders and will consider whether the State has struck a fair balance in its approach to such conflicts.<sup>8</sup>

The SHRC also takes this opportunity to highlight that, at the time of writing, judgment from the UK Supreme Court in the case of JR87 is awaited. The issue in that case is whether the nature of religious education and RO in Northern Ireland breaches the A2P1 rights of the parent and child, despite there being a parental right to withdraw. Although that case relates to education arrangements in Northern Ireland, the Supreme Court's interpretation of the requirements of A2P1 will be binding on Scottish courts. We will update the Committee once the judgment is handed down if we consider it to be materially relevant to Parliament's scrutiny of the Bill.

Finally, the SHRC shares, and wishes to amplify, the concerns of the CYPSC that the changes introduced by Part 1, if enacted, would not be in scope of a key part of the UNCRC Act. This is because Part 1 would amend the Education (Scotland) Act 1980, which is a pre-devolution Act of the UK Parliament. The UNCRC Act creates a duty for public authorities to act compatibly with the UNCRC when exercising a relevant function ("the compatibility duty"), but a function conferred by an Act of the

UK Parliament (even in a devolved area) does not qualify as a relevant function. Therefore, if a public authority acts incompatibly with the UNCRC when implementing the new process created by Part 1, it would not be possible to challenge this through the courts. Although the Scottish Government recognises this in the Policy Memorandum, it has declined to use a different drafting mechanism to bring the proposed changes within scope of the compatibility duty in the UNCRC Act. The SHRC is concerned that continuing to amend out of scope legislation because it may be simpler than creating new standalone legislation which would be in scope is preventing the UNCRC Act from achieving its full potential.

For the avoidance of doubt, the obligation to implement the requirements of the UNCRC still exists at the international level, even if the UNCRC Act does not currently apply to the new process which would be created by Part 1.



## Part 2 - UNCRC compatibility duty

### The legal framework

The effect of Part 2 of the Bill is highly technical in nature. Therefore, we consider it would be useful to set out in more detail how the UNCRC Act works and how Part 2 would change this before we set out our specific concerns.

The UNCRC Act makes the rights contained in the UNCRC (and set out in Schedule 1 to the Act) part of the domestic law of Scotland and therefore directly enforceable in the Scottish courts. The key means by which it does this is the 'compatibility duty' set out in section 6. Section 6 makes it unlawful for a public authority to act incompatibly with the UNCRC when exercising a relevant function. Where a child or their representative alleges that the compatibility duty has been breached, section 7 of the UNCRC Act enables legal proceedings to be brought against the public authority. The UNCRC Act also empowers the SHRC and the CYPSC to raise, or intervene in, such legal proceedings.

There are certain actions which are currently carved out from the compatibility duty in the UNCRC Act. A public authority will not be in breach of the compatibility duty if it is required, or entitled, to act incompatibly with the UNCRC by legislation of, or powers conferred by, the UK Parliament. This exception, or 'carve-out' is a consequence of the limits of the Scottish Parliament's powers under the devolution settlement, as defined by the Supreme Court.<sup>9</sup>

Part 2 of the Bill would create a further carve-out to the compatibility duty. This would allow public authorities to also act incompatibly with the UNCRC if required to do so by legislation of the Scottish Parliament. The scope of this exception is narrower than that which already exists in respect of reserved legislation (set out above) because it would only apply where the public authority is required, not just entitled, to act that way by devolved legislation. Nonetheless, the effect is that a conflicting statutory duty is to be given primacy over the general duty to act compatibly with the UNCRC. The legal effect of this is that more acts which are incompatible with the UNCRC may be taken outwith the scope of the compatibility duty and unable to be directly challenged in the courts.

The Scottish Government says in the Policy Memorandum accompanying the Bill that it is not the intention to remove the child's ability to seek a remedy for a violation of their UNCRC rights. Instead, the legal challenge can be directed to the Scottish Government and the underlying legislation which is compelling the public authority to act in such a way. It is our understanding that this would be done by raising a "compatibility question" as defined in section 31 of the UNCRC Act. Where a court

determines that words in legislation are incompatible with the UNCRC, depending on whether the legislation took effect pre or post commencement of the UNCRC Act, the court can either strike those words down so that they cease to have legal effect or issue a declarator of incompatibility.<sup>10</sup> A declarator of incompatibility is not binding and does not affect the validity of the legislation, although it does require the Scottish Government to make a statement to Parliament about its intended response to the declarator.

The SHRC has significant concerns about this for the reasons set out below.

### **Concern 1 - restricting access to justice**

Access to justice and to effective remedies are essential for the protection, promotion, and fulfilment of human rights. For rights to have meaning, effective remedies must be available in response to violations of those rights.<sup>11</sup>

By removing the ability to challenge the act of the public authority, Part 2 of the Bill reduces the options available to children who have had their rights violated. They would only be able to seek changes to the legislation which, while of course desirable, are not by themselves sufficient. For instance, a challenge to legislation will generally be via judicial review in the Court of Session, which can be prohibitively expensive, and even if successful it can take a significant length of time for changes to legislation to take effect.

Specifically, the SHRC is concerned about the availability of a timely and effective remedy in urgent cases where interim measures are sought. Interim measures can be ordered by a court on a temporary basis to prevent further harm and ensure basic needs are met pending final determination of the issue. The following hypothetical example demonstrates our concerns:

There is a conflict between existing Scottish legislation and the UNCRC in a housing case where a family with children is at imminent risk of homelessness. As a result of the proposed changes made by Part 2 of the Bill, the local authority would not be acting unlawfully by failing to comply with the UNCRC requirements because this is mandated by an Act of the Scottish Parliament. According to Part 2, the children can only direct a legal challenge to the Act of the Scottish Parliament, rather than the action of the local authority itself. However, the child and their representative want to seek an urgent interim order to prevent the family becoming homeless in the meantime until the court resolves the question of compatibility. Given that the local authority would not be acting unlawfully, it is not clear that there would be any basis on which the court could order the local authority to provide accommodation. Therefore, the harm would already be done

by the time the court determines that the Act of the Scottish Parliament is incompatible with the UNCRC, and the Scottish Government makes any changes as a result.

Moreover, the UNCRC Act gives the SHRC and the CYPSC a central role in relation to ensuring the effectiveness of the UNCRC Act in practice. A fundamental way in which it does so is by giving the SHRC and the CYPSC powers to raise, and intervene in, legal proceedings where it is alleged that a public authority has breached its section 6 compatibility duty. This is particularly important because of the well-documented barriers to access to justice in Scotland, which are often even more acute for children.<sup>12</sup> Consequently, narrowing the scope of the section 6 compatibility duty also narrows the power of the SHRC and the CYPSC to hold public authorities to account through the courts for failing to comply with this duty.

## **Concern 2 - disproportionate to the policy rationale**

According to the Scottish Government, the policy rationale underpinning Part 2 is threefold: (i) to minimise complexity for public authorities in interpreting and applying their duties under the UNCRC Act; (ii) to ensure legal coherence; and (iii) to ensure that the delivery of essential services that support children can continue where a potential incompatibility arises. For this reason, the Scottish Government assesses that Part 2 has a positive impact in relation to Article 4 UNCRC. Article 4 UNCRC requires a state to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights set out in the UNCRC.

The SHRC strongly disagrees with the Scottish Government's assessment.

As we set out above in respect of Part 1 of the Bill, the UNCRC Committee is the body tasked with overseeing implementation of the UNCRC by States. It publishes General Comments which are authoritative interpretations of the provisions in the UNCRC. Article 4 UNCRC is discussed in General Comment No. 5 (2003) on general measures of implementation of the UNCRC. The General Comment states the following:<sup>13</sup>

"Incorporation should mean that the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice".

It is difficult to see how prioritising other duties over the UNCRC requirements and actively removing options for individual redress, as Part 2 would do, strengthens the

implementation of the UNCRC. On the contrary, it is clear to us that Part 2 would weaken implementation.

Our concerns with Part 2 are heightened by the lack of transparency from the Scottish Government in respect of action taken to ensure legislation is compatible with the UNCRC. This also falls within the ambit of Article 4 UNCRC. The Scottish Government has stated that all current legislation in devolved areas should be UNCRC compliant because the Scottish Ministerial Code has always required Ministers to comply with international treaty obligations even if not incorporated in domestic law.<sup>14</sup> However, it has not stated whether it has undertaken an audit of its existing legislation, or something similar, to assess whether that is indeed the case. If the Scottish Government's properly informed assessment is that legislation is compatible with the UNCRC then Part 2 appears to be addressing a hypothetical problem and is not needed. On the other hand, if it is seeking to address a known problem, or insufficient work has been done to know if there is a real problem, then our concerns about the impact on access to justice are exacerbated.

The SHRC believes that legal coherence can be achieved without compromising on children's ability to seek redress for violations of their rights. The Scottish Government proactively identifying and remedying potential legislative incompatibilities would avoid public authorities having to choose between conflicting obligations. This links to the Scottish Government's own commitment to human rights "mainstreaming" whereby human rights are fully embedded in all policy and lawmaking.<sup>15</sup> Moreover, if this proactive approach is combined with the Scottish Government's power under the UNCRC Act to make urgent remedial regulations where necessary,<sup>16</sup> we believe this should provide sufficient safeguards to avoid any situation where essential services could not continue. We note that the Scottish Government has not offered any example of how this problem could arise in practice.

In these circumstances, we do not consider that any purported benefits of Part 2 can outweigh the serious access to justice concerns which it gives rise to.

### **Concern 3 - general approach to incorporation**

The SHRC is also concerned that Part 2 considers UNCRC incorporation exclusively via the lens of the duty bearer (the public authority) and how to simplify their duties. Yet the very essence of a human right is that it belongs to the individual. It gives the individual a more meaningful stake in their relationship with the State by providing a means to hold those with human rights responsibilities to account for their action or inaction.

It was the stated intention of the Scottish Government when introducing the UNCRC (Incorporation) (Scotland) Bill, which eventually became the UNCRC Act, that it was committed to a “maximalist” approach to incorporation:<sup>17</sup>

"In line with the "maximalist" approach, the Bill provides for the maximum protection possible for children's rights within the devolution settlement. The Bill seeks to ensure that incorporation, and therefore enforceability of the rights and obligations incorporated by the Bill is delivered up to the absolute limits of what is possible within the boundaries of the devolution settlement".

"The Scottish Government's intention is to give children's rights the highest status within Scotland's constitutional framework".

However, Part 2 does the opposite. It dilutes the protection currently afforded by the UNCRC Act and represents a failure to take the purported maximalist approach. It specifically prioritises the public authority acting incompatibly with the UNCRC where a conflict arises with another statutory duty.

We urge the Committee to consider this Bill in its wider context. The Scottish Government has committed to introducing a Bill in the next Parliamentary session (subject to the outcome of the 2026 election), which would seek to incorporate other international human rights treaties into the domestic legal system. We are conscious that the model of incorporation used in the UNCRC Act may well be copied for such future incorporation. This makes it even more important to critically evaluate both the practical impact of this proposed amendment, and the signal it sends about the Scottish Government's commitment to the strongest possible protection for human rights.

### **Potential mitigation**

The SHRC is opposed to the general principle underpinning Part 2 of the Bill for the reasons set out above. Notwithstanding this position, should Part 2 progress, we suggest that changes are made to provide for greater transparency and accountability in respect of potential legislative incompatibilities.

While we note that the statutory guidance on the UNCRC Act states that public authorities should notify the Scottish Government if they became aware of incompatibility issues in legislation, and the Children's Rights Scheme provides a mechanism for discussion of incompatibility issues, we do not think this sufficiently mitigates our concerns about Part 2 - not least because public authorities may be less likely to proactively notify the Scottish Government of incompatibilities if they are no longer subject to the compatibility duty.

Should the proposed changes progress, we suggest that a commitment is added to the Bill to the effect that:

- The Scottish Government will publish potential legislative incompatibilities of which it has been notified; and
- The Scottish Government will publish whether it intends to take any action to change the legislation and, if so, what and by when. Where the Scottish Government does not intend to take any action, it must explain why it assesses the legislation to be compatible with the UNCRC.
- Such publication will happen at regular intervals to be defined in the Bill.

In addition, we also urge the Scottish Government to confirm the steps that have been taken thus far to assess the compatibility of legislation which existed prior to the UNCRC Act taking effect. It is important that the Scottish Parliament's consideration of this Bill should be based on a full understanding of whether the Scottish Government is seeking to address a problem which is known to exist in practice and, if so, the extent of that problem.

## Conclusion

The SHRC has significant concerns in respect of both Part 1 and Part 2 of the Bill. These concerns potentially have wider application. The Bill reveals a concerning approach to authoritative UN recommendations, the relationship between the ECHR and the UNCRC, and the incorporation of international human rights standards in general.

The SHRC firmly believes in the ability of the UNCRC Act to positively transform the lives of children in Scotland. Accordingly, we are keen to avoid any changes which could weaken this, particularly so soon after incorporation of the UNCRC has finally been achieved. Our scrutiny of the Bill is aimed at collectively embedding the strongest possible culture of respect for children's rights in Scotland, and articulating opposition to developments that we believe could pave the way for a weaker approach to human rights incorporation in the round.



## Endnotes

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<sup>1</sup> UN Committee on the Rights of the Child, [General Comment No.20 \(2016\) on the implementation of the rights of the child during adolescence](#) at [43]

<sup>2</sup> For instance, UN Committee on the Rights of the Child, [General Comment No.5 \(2003\) on general measures of implementation](#) at [6].

<sup>3</sup> X and others v. Bulgaria, no. [22457/16](#), 2 February 2021.

<sup>4</sup> For instance, Perovy v. Russia no [47429/09](#), 19 April 2021 at [50].

<sup>5</sup> For instance, Folgerø v Norway no. [15472/02](#), 29 June 2007 at [84(h)].

<sup>6</sup> Joint Committee on Human Rights, [28th Report of Session 2005-2006](#) at [2.2-2.4].

<sup>7</sup> Folgerø v Norway no. [15472/02](#), 29 June 2007 at [98]

<sup>8</sup> For instance, Evans v UK, no. [6339/05](#), 10 April 2007; Fretté v France, no [36515/97](#), 26 February 2022.

<sup>9</sup> [Reference by the Attorney General and the Advocate General for Scotland](#) [2021] UKSC 42

<sup>10</sup> UNCRC Act, sections 25 and 26.

<sup>11</sup> UN Committee on the Rights of the Child, [Concept Note: General Comment on Children's Rights to Access to Justice and Effective Remedies](#).

<sup>12</sup> For instance, SHRC, [Access to Justice for Everyone: A Discussion Paper](#); CYPSCS [Evidence to the Equalities, Human Rights and Civil Justice Committee on Civil Legal Aid](#).

<sup>13</sup> UN Committee on the Rights of the Child, [General Comment No.5 \(2003\) on general measures of implementation](#) at [20].

<sup>14</sup> Policy Memorandum accompanying the Bill at [48-49].

<sup>15</sup> For further information, see the SHRC's [response](#) to the Scottish Government's consultation on the Equality and Human Rights Mainstreaming Strategy.

<sup>16</sup> UNCRC Act, section 41.

<sup>17</sup> UNCRC (Incorporation) (Scotland) Bill, [Policy Memorandum](#) at [60], [109].