

SHRC Response's to the Scottish Government's Consultation on Tribunal Rules for UNCRC Compatibility Questions

14th October 2025

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.

Question 1

Do you have any comments on the draft proposals relating to UNCRC compatibility questions arising in tribunals proceedings? We particularly invite comments on the proposed approach to the raising and intimation of such questions and subsequent notice requirements on Relevant Persons:

- a) In Scottish Tribunals and the Mental Health Tribunal for Scotland
- b) In terms of the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013

The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 ("2024 Act") enables courts and tribunals to determine whether certain legislation or acts of public authorities are compatible with the requirements of the United Nations Convention on the Rights of the Child ("UNCRC"). These are known as "compatibility questions" and are defined in section 31(1) of the 2024 Act. The SHRC welcomes the creation of rules to govern the process relating to compatibility questions that arise in tribunal proceedings. The SHRC believes that rules will assist the SHRC to perform its statutory functions under the 2024 Act and provide greater clarity for all those involved. This should, in turn, promote access to justice and enhance the protection of children's rights in Scotland. The SHRC makes the following comments on the proposals of the Scottish Government to ensure that the content of the rules achieves this.

The SHRC agrees with the principle set out at paragraph 12.a of the consultation note that a compatibility question should be able to be raised at any stage in the proceedings as the need for a compatibility question may only become apparent as the shape of the case develops. The SHRC notes and does not object to the proposal to caveat this principle so that the tribunal can manage proceedings effectively. However, the SHRC queries whether the intention to make this subject to the unlimited discretion of the tribunal is too broad. The SHRC suggests that the rules could expressly contain a statement of the principle set out in paragraph 12.d that it is essential that children are readily able to raise compatibility questions as they arise so that this principle can inform the exercise of the tribunal's discretion.

As an extension to the principle in paragraph 12.a, the SHRC agrees with the principles in paragraphs 12.b and 12.c that parties should be encouraged to raise a compatibility question as early as possible, which will generally mean the application notice or initial response, but that it is important that there should also be flexibility in the rules to raise compatibility questions at a later stage.

The SHRC agrees with the principle in paragraph 12.c that the tribunal should have written notice of compatibility questions, subject to the tribunal having discretion to accept notice in such other form as it sees fit, taking account of the position of each of the parties. However, the SHRC is conscious of the unique procedure at Children's Hearings and therefore queries whether further consideration should be given to whether written notice as the default is appropriate in that context.

The SHRC agrees with the principle in paragraph 12.d that flexibility to raise a compatibility question should be balanced against the need for the tribunal to properly understand the basis on which the compatibility question is said to arise. Therefore, the SHRC agrees that the rules should provide for the tribunal to seek further information or clarification where necessary, and that the tribunal should do so according to the overriding objective and ensuring that all parties are supported and fully able to participate. In addition, the SHRC also considers that it would be useful for the rules to provide that where the tribunal is unsure whether a party is seeking to raise a compatibility question, that it can similarly seek further information or clarification from the party. The SHRC believes this to be important because an unrepresented party may not be familiar with the language or concept of compatibility questions, particularly since the 2024 Act is still a relatively new piece of legislation.

The SHRC broadly agrees with the proposals set out in point 12.e for intimation on the "Relevant Persons", but wishes to highlight the following suggestions:

- The rules should make clear that the tribunal should satisfy itself that the compatibility question is sufficiently clear before intimation on the Relevant Persons.
- The rules should also require intimation of the respective positions of the parties in relation to the compatibility question, together with any other relevant pleadings and evidence. The SHRC considers that this would assist the Relevant Persons to make an informed decision about whether to take part in the proceedings.
- The proposal for 14 days to be the default timeframe for Relevant Persons to notify the tribunal if they intend to take part should be expressed as a minimum which should only be shortened in exceptional circumstances. It could also be expressly accompanied by an acknowledgement in the rules that the tribunal should have regard to the complexity of the proceedings when considering whether the default timeframe should be extended. The complexity should also be considered when setting the timeframe for submission of the substantive written intervention after the Relevant Person has notified their intention to intervene.

The SHRC recommends that consideration is given to whether further amendments are needed to ensure that Relevant Persons are able to take part as a party to proceedings insofar as relates to the compatibility question, per their entitlement under section 34(2) of the 2024 Act. For example, entitlement to attend relevant hearings or receive relevant documentation.

The SHRC also suggests that the rules should contain a provision, similar to that in the respective rules for the Sheriff Court¹ and the Court of Session², which makes clear that where a Relevant Person does not take part as a party to proceedings at first instance, this does not preclude it from taking part as a party in any subsequent appeal or reference to a higher court. The necessary information should be intimated to the Relevant Person to enable them to determine whether to do so.

Finally, the SHRC suggests that the rules should include details of how the tribunal can refer the compatibility question to the Inner House of the Court of Session pursuant to section 35 of the 2024 Act, and that notice of such reference should be given to the Relevant Persons where not already a party to the proceedings. See, for instance, Rule 25A.8 of the Rules of the Court of Session 1994.

¹ Rule 7(7) of the Proceedings for Determination of Compatibility Questions Rules 2024

² Rule 25A.7(2) of the Rules of the Court of Session 1994

Question 2

Do you have any further comments on the indicative draft:

- a) Rule amendments in Scottish Tribunals and the Mental Health Tribunal for Scotland (Annex A)
- b) Regulations to amend the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 (Annex B)?

The SHRC does not at this stage make any substantive comments on the indicative draft rules beyond those made in response to question 1 above. However, the SHRC does note that the drafts incorrectly refer to the "2014 Act" rather than the "2024 Act".

The SHRC would appreciate the opportunity to comment on the drafts published with the next stage of the consultation.