

## SHRC Response to the Scottish Government's Consultation on Tribunal Rules for UNCRC Compatibility Questions - Stage 2

19th December 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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## Introduction

As set out in the SHRC's response to the Government's first consultation, the SHRC welcomes the creation of rules to govern the process relating to compatibility questions that arise in tribunal proceedings. The SHRC considers that the rules will assist the SHRC to perform its statutory function under the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 ("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 is grateful for the opportunity to provide further comments on the draft rules for tribunals.

## Process for a party to raise a compatibility question

The SHRC previously expressed concern that the ability to raise a compatibility question at any stage in the proceedings was subject to the unlimited discretion of the tribunal. The SHRC therefore welcomes the removal of that discretion and the simplification of the rules insofar as relates to when a compatibility question can be raised in proceedings.

The SHRC queried whether it was appropriate for written notice of a compatibility question to be the default in Children's Hearings in light of their unique procedure. The SHRC therefore welcomes the express provision in the rules for Children's Hearings that compatibility questions can be raised orally, as well as in writing.

The SHRC notes that the draft rules require a party to set out the facts, circumstances and contentions of law in sufficient detail, and also require the tribunal to seek further detail where necessary. The SHRC has the following comments:

- We suggest that the previous formulation of "further and better particulars" may be more appropriate as that reflects the language used elsewhere in, for instance, the First-tier Tribunal for Scotland Health and Education Chamber (Procedure) Regulations 2017.
- While we recognise that all tribunal procedure is governed by the overriding objective, the SHRC suggests that it may be beneficial to make clear in the rules that further information is sought by the tribunal in furtherance of the overriding objective to ensure all parties are supported and fully able to participate.
- The SHRC repeats our suggestion that the rules provide for the tribunal to seek further information or clarification from a party where the tribunal is

unsure whether a party is seeking to raise a compatibility question. We believe this is important because an unrepresented party may not be familiar with the language or concept of compatibility questions.

- The SHRC suggests that the Scottish Government should consider whether it is appropriate for the reporter in respect of Children's Hearings to have the same role as the tribunal in relation to the clarification of compatibility questions.

## Process for intimation of a compatibility question on the relevant authority

The SHRC welcomes the inclusion of our suggested additions relating to the information and documentation to be provided when intimating a compatibility question to the SHRC. In particular, we welcome the inclusion of the respective position of each of the parties when the compatibility question is intimated to the SHRC. We believe this will assist the SHRC to accurately and efficiently assess whether we wish to exercise our power of intervention. However, the SHRC notes that the draft rules would leave it to the discretion of the tribunal or the reporter to decide which documents are deemed necessary for the relevant authority to consider. The SHRC is of the view that all documents should be provided to the relevant authority. This would ensure that the relevant authority has the full picture as there may be an angle that the tribunal or the reporter has not considered itself. It would also avoid any potential delay to proceedings if the relevant authority has to request sight of a document that has not already been provided.

The SHRC welcomes the inclusion of provisions setting out the procedure for the intimation of compatibility questions to the relevant authority upon reference to a higher court, per the SHRC's suggestion. However, the SHRC has the following queries and comments in relation to the detail of these provisions:

- The SHRC queries whether the "reference" from the First-tier Tribunal to the Upper Tribunal should instead be "appeal". If so, the Scottish Government may wish to consider whether this is already covered by the provisions made for raising and intimating compatibility questions in the rules for the respective chambers of the Upper Tribunal.
- The SHRC would welcome express acknowledgment in the rules that if a relevant authority does not take part in first instance proceedings this does not preclude the relevant authority from taking part in any subsequent appeal relating to a compatibility question.

- Section 35(2) of the 2024 Act confirms that any tribunal may make a reference to the Inner House of the Court of Session and a tribunal from which there is no appeal must make such a reference. Therefore, it is not only the Upper Tribunal which can refer a compatibility question to the Inner House. The SHRC considers it is important that section 35(2) is properly reflected in the rules.
- The SHRC recommends that the Scottish Government considers whether further detail on the procedure to be followed in respect of references to the Inner House should be included in the rules. See, for instance, rules 11 and 12 in the Proceedings for Determination of Compatibility Questions Rules 2024 for the Sheriff Court. These set out how the reference should be transmitted to the Inner House and then the procedure to be followed following determination of a reference or appeal.

## Response to a compatibility question and the participation of a relevant authority in proceedings

The SHRC notes that the draft rules set a default timeframe of 14 days which can be varied should the tribunal be satisfied there are circumstances which require the timeframe to be adjusted. We recognise that this formulation goes some way to addressing the concerns which gave rise to our previous suggestion, that the default timeframe of 14 days be expressed as a minimum which should only be shortened in exceptional circumstances, together with an express acknowledgment in the rules that the tribunal should have regard to the complexity when considering whether the default timeframe should be extended. However, the SHRC remains of the view that it would be preferable for the rules to contain an acknowledgement that the default timeframe should only be shortened in exceptional circumstances.

The SHRC also notes that the draft rules set a default timeframe of 7 days after confirmation of intention to take part in proceedings to lodge written submissions. The SHRC considers the current drafting of this provision to be confusing as it sets a default of 7 days while at the same time it provides for the response "within such period" as the tribunal specifies. The SHRC suggests that these should be formulated as alternatives: the relevant authority must provide written submissions to the First-tier Tribunal within 7 days after confirmation of intention to take part, or within such period as the First-tier Tribunal may specify, having regard to the complexity and stage of proceedings.

Finally, the SHRC notes that no other provisions have been included to ensure that a relevant authority can take part as a party to proceedings. For example, entitlement to attend hearings. The SHRC previously recommended that consideration is given

to whether further such amendments are needed. It is unclear whether or not this has been considered. If it was considered and rejected, the SHRC would be grateful for an explanation from the Scottish Government as to why this was not considered necessary.