

## **Incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland: Working Group, 4th Meeting, 27 August 2019**

### **Summary of Workshop Discussions**

1. At the fourth meeting of the Working Group, which took place on 27 August 2019, facilitated workshop-style discussions took place around issues raised in Theme 3 of the consultation: Enabling Compatibility and Redress including:

- Challenging public bodies and seeking financial compensation.
- Order of precedence where secondary legislation is in conflict with UNCRC rights
- Acts of the Scottish Parliament – statements of compatibility, challenging Acts of the Scottish Parliament and interpretation of Acts
- Standing to take proceedings

2. This note seeks to summarise the varying views and opinions expressed by individual Members, setting out the points raised under key themes. It should be noted that, as the points outlined below were made in separate workshop-style discussions, they were therefore not discussed by the group as a whole. Thus the lack of response to individual points or the lack of provision of solutions should not be taken to indicate unanimous agreement on the points made or the lack of existence of potential response to issues raised by individual members in workshop discussion.

### **Challenging public bodies and seeking financial compensation**

3. As discussed in the consultation document, it was noted that the goal of incorporation would be, not only to set out clearly what children's rights are, but also to create mechanisms which seek to ensure that those rights will be complied with and enforced. The following points were raised by individual Members in discussion, emphasising points made in the consultation:

- It was considered by some that the development of a scheme of remedies, which would provide mechanisms for rights holders to challenge perceived infringements of their rights, would be a key step towards ensuring that rights are 'binding not guiding'.
- A Member suggested that there could be a range of ways in which the courts might consider the duties attached to the individual rights included in the UNCRC and that the development of the Scottish Bill should therefore give careful consideration to the:
  - individual convention rights
  - duties attached to the rights – and the possible expectations of duty bearers and the courts in relation to these; and
  - possible remedies for infringement of individual rights.

- It was also suggested by some that it would be important for there to be clarity on the duties around the rights, particularly where these may be in conflict with existing legislation.
- A Member also expressed a view that there should be a clear expectation that public authorities should provide what is practical with the resources available to them.

### *Remedies and Redress*

4. Members considered the possible remedies that might be associated with alleged violations of the Convention rights. The following points were made by individual Members in discussion:

- A Member suggested that, although the ECHR HRA model is a helpful comparator, this may not meet the “considered standard” for effective remedy in international law.
- A Member proposed that Child centric complaints mechanisms should be available alongside more formal methods for redress.
- A Member suggested that, for certain cases, there may be a need for clear guidance on remedies to be placed in statute, as the less provision that is made about remedies in the Bill, the more reticent the courts might be to intervene in some cases. The Member also noted that, in addition to standard remedies which may be provided for, there may be an opportunity for new remedies to be added.
- Some Members proposed that the Scottish Bill could provide for a more expansive standard of reasonableness to be applied. It was also suggested by some that there would be a need to consider proportionality when considering whether or not a decision was reasonable.
- Other Members noted that the Bill, developed by an advisory group convened by the Children’s Commissioner and Together Scotland, provides that a court may grant any relief, remedy or order that is within the power of a civil court and may make an award of damages.<sup>1</sup>
- Some Members suggested that measures around redress should provide for accountability at all levels of public authorities, including the Scottish Ministers. It was noted by some that a first line of defence for public authorities might be to escalate to Scottish Ministers on grounds of having insufficient resources to design and deliver services consistent with meeting children’s rights.

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<sup>1</sup> <https://www.cypcs.org.uk/ufiles/Children's-Rights-Scotland-Bill.pdf>

- Some Members suggested that it would be important not to develop a 'compensation culture', but to instead focus on resolution and improvement. However, other Members noted that it would be important to maintain a position whereby judges can grant the remedy they think most appropriate in the circumstances. Those Members also suggested that financial compensation should also be available, where relevant.
- Some Members expressed a view that the payment of financial compensation was unlikely to address cases involving significant systemic violations of rights in isolation. However, it was acknowledged that, on occasion, the payment of damages could assist in encouraging a body to address systemic failures. The human rights cases involving 'slopping out' by prisoners were cited as an example. A Member also suggested that individual cases may involve the courts being asked to address systemic failings.
- Members' attention was drawn to the views of young people. At SYP's recent day of discussion, young people suggested that the method for incorporating the UNCRC into Scots law should provide for both the payment of financial compensation and measures to address wider systemic failures and prevent future violations of rights.<sup>2</sup>
- Some Members also suggested that there would be a need to manage the expectations of rights holders when raising awareness of provisions in the Scottish Bill (once finalised) around the right to challenge and seek redress. They suggested that some rights holders might expect any potential provisions to guarantee that certain decisions would be reversed or financial compensation awarded.

### *Access to Remedies*

- It was also suggested by some that, where appropriate, it would be in a child's best interests to have a remedy for the violation of a right as quickly as possible. In view of this, it was proposed that there would be a need to consider how to shorten the timeframes for rights holders to hold public authorities to account for alleged infringements of rights. Some Members suggested that a dedicated independent body could have a role that would allow for early resolution of violations without the requirement for formal court proceedings. Other Members considered that the ability to develop early resolution in individual cases would be dependent on how the duties were defined in legislation.
- A Member proposed that international models for fast tracking complaints, for example, the Tutela system in Columbia, may provide helpful examples.

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<sup>2</sup>[https://d3n8a8pro7vnm.cloudfront.net/scottishyouthparliament/pages/281/attachments/original/1564484934/SYP's\\_response\\_to\\_UNCRC\\_consultation\\_.pdf?1564484934](https://d3n8a8pro7vnm.cloudfront.net/scottishyouthparliament/pages/281/attachments/original/1564484934/SYP's_response_to_UNCRC_consultation_.pdf?1564484934).

- Some Members also expressed a view that children and young people would need support to raise claims, for example through awareness raising and the provision of advocacy support. Other Members suggested that 'soft' complaints procedures for example, the use of mediation, could help to speed up the resolution of complaints. It was also suggested by some that, due to the limited capacity of the court system, cases should only be taken to court as a last resort.
- A Member suggested that the Scottish Bill should focus only on incorporation of the UNCRC into Scots law. They suggested that measures in relation to the management of court processes and the development of new complaints systems should be taken forward outwith the Bill.

### *Interim Measures*

5. Members also discussed interim measures particularly where there was an imminent risk of harm. Rule 39 of the Rules of Court of the ECHR was referenced in this respect.<sup>3</sup> A Member suggested that there were a range of existing interim measures available to the courts.

### **Order of precedence where secondary legislation is in conflict with UNCRC rights**

6. Members also considered how to address those instances where the UNCRC rights might be in conflict with existing secondary legislation. The following points were raised in discussion:

- Some Members suggested that the interaction of provisions in the Scottish Bill with current secondary legislation may create difficulties for public authorities, where duties may be in conflict with the UNCRC.
- Some Members suggested that there could be a need to re-evaluate secondary legislation and conduct risk assessments of where secondary legislation may be in conflict with the Convention. Such an exercise would take time to complete.
- As noted in previous discussions, some Members suggested that there would be a need for public authorities to distinguish between their devolved and reserved functions in considering incompatibility and the prioritisation of legislation.

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<sup>3</sup> [https://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf)

## **Acts of the Scottish Parliament – statements of compatibility Challenging Acts of the Scottish Parliament and interpretation of Acts**

7. Members also considered whether there should be a requirement for a statement of compatibility with children's rights to accompany legislation on introduction to the Scottish Parliament. The following points were raised in discussion:

- Members noted that the First Minister's Advisory Group on Human Rights Leadership was supportive of the use of compatibility statements and a robust pre-legislative scrutiny process conducted by Parliament.
- A Member asked how any statement of compatibility with children's rights will address the General Comments and Concluding Observations.
- Some Members suggested that the current non-statutory Child Rights and Wellbeing Impact Assessment (CRWIA) for all new legislation provides a more in-depth consideration of compliance with the Convention than a statement of compatibility. However, it was suggested by some that such a statement, in addition to the CRWIA, could be helpful. Other Members suggested that the use of CRWIAs should be a statutory requirement. It was also proposed by some that CRWIAs should be further promoted as a key tool in the development of policy.

8. Members also considered whether the Scottish Bill should contain provisions requiring an Act of the Scottish Parliament (ASP) to be interpreted and applied, as far as possible, in a manner which is compatible with the UNCRC. They also considered the issue of guidance on compliance:

- Some Members suggested that there is a need for the Scottish Government to provide clarity on the relationship between provisions in the Scottish Bill and existing legislation.
- A Member proposed that individual sectors should develop their own guidelines on compliance. They further suggested that the Children's Commissioner could have a role in development and review of different sectoral guidance.
- A Member cited the Well-being of Future Generations (Wales) Act<sup>4</sup> and suggested that the Future Generations Commissioner worked with the Children's Commissioner in Wales to produce helpful guidance for public authorities on implementation of the provisions.

9. Members also considered whether the Scottish Bill should provide for a regime which would enable rulings to be obtained from the courts on the question of whether a provision in an Act of the Scottish Parliament was incompatible with the rights secured in the Bill. The following points were raised in discussion:

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<sup>4</sup> <https://futuregenerations.wales/about-us/future-generations-act/>.

- Some Members expressed a view that Acts of the Scottish Parliament should be subject to judicial review on the grounds of incompatibility with the rights in the Scottish Bill.
- Some Members stressed the need for enhanced scrutiny of provisions in the pre-legislative phase, including the use of dedicated committee procedure and Standing Orders of the Scottish Parliament, to enhance provisions. The Finnish model of enhanced pre-legislative scrutiny was cited as a good practice example.
- A Member suggested that the Welsh Measure, including the duty to have due regard and the use of a Child Rights Impact Assessment, has enhanced pre-legislative scrutiny in Wales.
- Some Members suggested that the courts should have the opportunity to strike down legislation passed that does not comply with the UNCRC after the commencement of provisions in the Scottish Bill. However other Members considered that this would be a considerable power to give to the courts, diminishing the power of the Parliament. Some Members suggested that strike down powers should only relate to secondary legislation.

### **Standing to take proceedings**

10. Members also considered whether any special test for standing to bring a case under the Scottish Bill should be required. The following points were raised in discussion:

- Some Members considered that arrangements for standing similar to or beyond those for the Human Rights Act should be adopted. For example, this might include group proceedings or public interest litigation.
- Other Members considered that children over the age of 12 who had capacity should be able to make representations. It was further suggested by some that the parents or carers of children under 12 years could represent their child's interests.

**September 2019**