

Equality and Human Rights Committee: UNCRC (Incorporation) (Scotland) Bill

Written Evidence

16 October 2020

[Dr Katie Boyle*](#)

Associate Professor of International Human Rights Law, University of Stirling

1. Will the Bill make it easier for children to access their rights?

- 1.1. This Bill is a watershed moment for human rights in Scotland. It will reform the existing framework for the benefit of children living here by creating a statutory framework designed to enhance access to rights under the provisions of the UNCRC in so far as it is possible to do so within devolved competence. It is innovative in nature and ground breaking in terms of devolved legislation in the UK in seeking a maximalist approach to human rights protection in accordance with international obligations. I welcome the Bill and the aims it seeks to achieve. The following evidence helps to clarify areas for further consideration and makes recommendations in terms of potential improvements to the framework from a legal and human rights perspective. Any Bill that seeks to ensure a maximalist approach should ensure that the duties contained in the Bill are genuinely transformative in nature. Likewise, access to justice for non-compliance must be available if failure to comply with duties results in a violation of the UNCRC. This is the threshold against which this written evidence measures the Bill.
- 1.2. The Bill in its current form only goes part of the way to introducing a system that enables children to access their rights. The primary route of access to rights should operate through the obligations placed on the executive and public authorities to create a children's rights scheme, through the operation of child rights and wellbeing and impact assessments and through the reporting procedures.¹ The Bill makes it unlawful for public authorities to act in a way that is incompatible with the UNCRC (section 6). This duty should embed rights compliance, and access to rights, into decision-making processes from the outset. Nonetheless, when creating or expanding access to rights it is important to reflect on how rights holders can access justice should a violation of their rights occur, i.e. how can a child access his or her right if the duty bearer acts unlawfully? This requires reflecting on the broader framework of redress, access to justice and access to effective remedies. As the UN Committee on the Rights of the Child stipulates, 'for rights to have meaning, effective remedies must be available to redress violations'.²

* Associate Professor of International Human Rights Law, School of Law, University of Stirling
Katie.Boyle@stir.ac.uk – this research has been partly funded by the Scottish Human Rights Commission and the Nuffield Foundation project 'Access to Justice for Social Rights: Addressing the Accountability Gap.' Dr Boyle was a member of the First Minister's Advisory Group on Human Rights Leadership, the Scottish Government's Working Group on UNCRC Incorporation and the Expert Advisory Group on UNCRC Incorporation convened by Together and the Children's Commissioner. Dr Boyle has recently published a book entitled '*Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication*' (Routledge 2020).

¹ Part 6 UNCRC (Incorporation) (Scotland) Bill ('the UNCRC Bill')

² UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5 para.24

- 1.3. The Policy Memorandum notes that the Bill seeks to ensure that children's rights are 'built into the fabric of decision-making in Scotland and that these rights can be enforced in the courts' (para.6). It also explains that the Bill seeks to adopt a 'maximalist' approach by ensuring that the rights are enforceable in courts and that there are 'effective remedies' for violations of the UNCRC (para.83). **I recommend that the right to an effective remedy is explicitly recognised on the face of the Bill.**
- 1.4. The Bill does not provide a definition of what constitutes an 'effective remedy' nor does it compel the court to ensure the remedy deployed meets the threshold of an 'effective remedy'. The duty to provide an effective remedy is a key component of international and regional human rights law. The right to an effective remedy stems from Article 8 of the Universal Declaration of Human Rights, which provides 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.' Article 13³ of the European Convention on Human Rights (ECHR) provides that 'everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'. Article 47 of the EU Charter of Fundamental Rights provides that 'everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article'.⁴
- 1.5. The right to an effective remedy forms an implicit obligation under the UNCRC.⁵ The Bill and the UNCRC are silent on what constitutes an effective remedy for a violation of the treaty. The Committee on the UN Convention on the Rights of the Child provides further guidance as to effective remedies. Children's special and dependent status can pose difficulties for them pursuing remedies for breaches of their rights.⁶ States must therefore give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives.⁷ There should be access to 'appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration'.⁸ Importantly, the duties under the Convention must be interpreted with reference to the wider international human rights framework.⁹ In international human rights law, effective remedies can include, among other things: restitution, compensation, rehabilitation, satisfaction, effective measures to ensure cessation of the violation and guarantees of non-repetition. Specific remedies beyond compensation include: public apologies, public and administrative sanctions for wrongdoing, instructing that human rights education be undertaken, ensuring a transparent and accurate account of the violation, reviewing or disapplying incompatible laws or policies, use of delayed remedies to facilitate compliance, including rights holders as participants in development of remedies and supervising compliance post-judgment.¹⁰

³ Please note that although Article 13 ECHR was not incorporated into domestic law under the Human Rights Act 1998, it still forms part of the UK's obligations under the treaty and forms part of jurisprudence regarding the UK's obligations.

⁴ Article 47 will no longer be enforceable domestically as the EU Charter of Fundamental Rights no longer forms part of domestic law under section 5 EU (Withdrawal) Act 2018.

⁵ The UN Committee on the Rights of the Child stipulate that 'this requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties.' Para.24

⁶ CRC General Comment 5 para.24

⁷ *ibid*

⁸ *ibid*

⁹ *ibid*

¹⁰ Katie Boyle, *Access to Justice Academic Advisory Panel Briefing*, National Task Force on Human Rights Leadership, September 2020 (available on request)

- 1.6. In its existing format the Bill does not compel decision makers or the courts to have regard to the international human rights framework when interpreting the UNCRC. This means that interpretation of the treaty domestically may fall short. **In order to address this gap, section 4 of the Bill should be expanded so that the court 'shall take into account' other international human rights treaties, decisions of the UN Committee on the Rights of the Child and other UN Committee decisions, General Comments under the international human rights framework and other comparative jurisprudence.**
- 1.7. The Bill in its current form only goes part of the way to introducing a system that enables children to access their rights. Whilst there are an array of remedies explicitly set out in the Bill there is no obligation on the court to ensure the remedy deployed meets the threshold of an 'effective remedy'. The Bill does not depart drastically from existing domestic frameworks mirroring the way that the ECHR is incorporated into domestic law through the Human Rights Act 1998 ('HRA') and Scotland Act 1998 ('SA'). The Bill draws on the existing statutory framework. It expands and enhances Scotland's domestic human rights framework to include protection of the rights contained in the UNCRC. This is welcome and is a helpful way to expand existing jurisprudence. It means there is a degree of familiarity to both the court and to those working in the legal sector. There is scope to go further.
- 1.8. The mirroring exercise means that remedies available under the HRA and SA are reflected in the UNCRC Bill. Section 6 of the Bill makes it unlawful for public authorities to act in a way which is incompatible with the UNCRC (section 6 – mirrors s29 SA and s6 HRA). Devolved and Westminster legislation engaging with devolved areas of competence must be interpreted in so far as is possible to comply with UNCRC (section 19 – mirrors section 3 HRA/ section 101 SA). Where there is an incompatible provision in Scottish Parliament legislation passed before the Bill the court has the power to strike down the incompatible legislation (sections 20 – mirrors ultra vires declaration under section 29 SA). The court may suspend the effect of such a strike down power to allow the incompatible provision(s) to be remedied (section 20(5) mirrors section 102 SA). Where it is not possible to interpret in a compatible way, or to strike down incompatible legislation, the court can issue a declaration of incompatibility for Scottish Parliament legislation passed after the Bill or for Westminster legislation in areas of devolved competence (section 21 – mirrors section 4 HRA). The legislation continues to be in force until amended by legislation, or by way of Remedial Regulations (Part 6 – mirrors Schedule 2 HRA).
- 1.9. If the court issues a strike down or incompatibility declaratory order the Scottish Ministers must submit a report within six months of the judgment setting out what steps (if any) they intend to take (section 23). This is a new mechanism to encourage compliance post-judgment, and is particularly important in the context of declarations of incompatibility, which in the context of the HRA and ECHR, have been deemed insufficient to meet the threshold of an 'effective remedy' in the context of ECHR jurisprudence.¹¹ In order to meet the threshold of an effective remedy there has to be a 'long-standing and established practice' of giving effect to the courts' declaration of incompatibility by remedying the incompatible legislation.¹² The European Court of Human Rights held that remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness.¹³ The reporting procedure may therefore bring the declaration of incompatibility within the threshold of an effective remedy if the Scottish Ministers and/or

¹¹ *Burden v UK* Application No 13378/05, Judgment, 12 December 2006.

¹² *Ibid*, at para.36

¹³ *Ibid*, at para.36

Scottish Parliament establish a practice of amending incompatible legislation following a declaration. It would be preferable if this obligation was reflected on the face of the Bill. In other words, **the reporting procedure (section 23) should include an obligation to take action to remedy the incompatible legislation in addition to the duty to report.**

1.10. Each of the remedies discussed above may go some way to ensuring an effective remedy. Further, the Bill provides that courts can issue remedies that it considers to be 'just and appropriate' (section 8 (1)), including the award of damages (section 8(2)). Under section 8(1) there is scope for the court to deploy remedies that go beyond those explicit remedies discussed above (ie. Duty to interpret as compatible, strike down powers, delayed remedies, compliance post-judgment through reporting procedure, declarations of incompatibility). For example, the power to issue remedies that are 'just and appropriate' could include embracing child centric remedies that facilitate participation. However, without the obligation to ensure remedies are effective there is no guarantee that the court will seek to meet this threshold. In other words, in order to embrace the 'maximalist' approach and to ensure that the remedies deployed are genuinely effective the Government should make this explicit on the face of the Bill itself.

1.11. RECOMMENDATIONS:

*1.10 Given that the requirement to provide effective remedies is an implicit component of the UNCRC and forms part of the Government's Policy Memorandum, section 8(1) could be amended to encourage the court to issue remedies it considers to be 'just, **effective** and appropriate'.*

1.11 Alternatively, the Bill could contain an explicit 'right to an effective remedy' reflecting the examples found in Article 8 UDHR, Article 13 ECHR or the wider definition contained in Article 47 EU Charter of Fundamental Rights. The courts already have been under a duty to meet this threshold in connection with EU law (a right and remedy that has been lost due to Brexit) and so there is an established practice that can be built upon.¹⁴

1.12 Without explicit instructions courts may take a narrow approach to interpretation under section 4 meaning that the UNCRC is interpreted in isolation of the international human rights framework. This is problematic because the meaning and content of rights cannot be fully understood without a broader interpretation in context. Section 4 of the Bill should be expanded to reflect an interpretation section where the court interprets the UNCRC with reference to international human rights law, decisions of UN Committees, UN General Comments and comparative jurisprudence.

1.13 The reporting procedure under section 23 should be expanded to include a duty to take action to remedy the incompatible legislation in addition to the duty to report.

2. What do you think about the ability to take public authorities to court to enforce children's rights in Scotland?

2.1. In relation to the role placed on the court, it is already possible to take public authorities to court to enforce children's rights across the UK but only in limited circumstances. For

¹⁴ See the deployment of an effective remedy under Art 47 in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62 and *UNISON, R (on the application of) v Lord Chancellor* [2017] UKSC 51

example, Lady Hale in the case *ZH Tanzania*¹⁵ developed a principle whereby rights engaged under the ECHR, including Article 8, should be interpreted with reference to international human rights obligations including the UNCRC.¹⁶ In the case of *McLaughlin* a widowed mother and her children were unable to avail of bereavement support following the death of an unmarried partner and the father to the children. The court interpreted Article 8, Article 14 and Article 1 Protocol 1 of the ECHR with reference to the UNCRC and ICESCR.¹⁷ The court considered the adverse impact on the children was disproportionate in light of the best interests of the child principle contained in the UNCRC and that the 'children should not suffer this disadvantage because their parents chose not to marry'.¹⁸ This is an example of enforcing children's rights in court, but only within the scope of the ECHR. Children's rights can also be enforced under existing statutory law, under equality law and through the common law.¹⁹ However, because the UNCRC is not yet fully incorporated, it means that existing case law is limited. Enforcing children's rights under UNCRC is only available in limited circumstances and there is no overarching duty to comply with the treaty in domestic law. In the Scottish case of *Nyamayo and Okolo v SSHD* the Lord President, Lord Carloway, made this clear when stating that the rights under the UNCRC do not currently form part of the law in the UK.²⁰ This creates an accountability gap across the UK and in Scotland. The UNCRC Bill addresses this gap in Scotland within areas of devolved competence.

- 2.2. The ability to take public authorities to court to enforce children's rights in Scotland is a key component of a system that ensures access to effective remedies if a violation of a right occurs. Indeed, without recourse to court the Bill would not constitute 'incorporation'.²¹ In other words, if recourse to the courts was removed then the Bill would be a form of implementation or integration of rights but would not meet the threshold required to constitute 'incorporation' giving legal effect to the treaty in domestic law.²²
- 2.3. When designing a new human rights framework constitutional theory and practice suggests that the responsibility for rights compliance should be embedded across the work of the legislature, the executive and the judiciary.²³ The role of the court should be viewed as part of a larger statutory framework that places duties on the legislature, the executive and the judiciary to comply with the UNCRC. Whilst the court should not abdicate its role to hold public authorities to account when a violation occurs, it is also important to note that the court must be the last, and not the first resort. In other words, the Bill should ensure the duty to comply with UNCRC is not just the responsibility of the courts but is shared between the legislature, the executive and the judiciary in a multi-institutional approach.

¹⁵ *ZH Tanzania v SSHD* [2011] UKSC 4

¹⁶ *McLaughlin, Re Judicial Review (Northern Ireland) (Rev 1)* [2018] UKSC 48 (30 August 2018); *H (H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening)* [2013] 1 AC 838, *Stevens v Secretary of Communities and Local Government* [2013] JPL 1383, approved in *Collins v Secretary of State for Communities and Local Government* [2013] PTSR 1594

¹⁷ *McLaughlin* *ibid*

¹⁸ *McLaughlin* *ibid* para.42

¹⁹ See Katie Boyle, *Economic and Social Rights Law, Models of Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020), chapter five

²⁰ *Nyamayo, (First) Natasha Tariro Nyamayaro and (Second) Olayinka Oluremi Ok Against The Advocate General and The Commission For Equality And Human Rights* [2019] ScotCS CSIH_29 (07 May 2019) para.79

²¹ Katie Boyle, *Economic and Social Rights Law*

²² Lundy, L., Kilkelly, U., & Byrne, B. (2013). 'Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review', *International Journal of Children's Rights*, 21(3), 442-463 at 444

²³ Katie Boyle, *Models of Incorporation and Justiciability for Economic, Social and Cultural Rights* (Scottish Human Rights Commission 2018) available at https://www.scottishhumanrights.com/media/1809/models_of_incorporation_escr_vfinal_nov18.pdf

- 2.4. **In relation to the duties placed on the legislature** there is no ‘duty to comply’ placed on the Scottish Parliament (the public authority section does not extend to SP (section 6(3)(b)). Indeed the Policy Memorandum suggests that a provision requiring future Acts of the Scottish Parliament to be compatible with UNCRC would effectively change the power of the Parliament and is, therefore, beyond its current powers (para.107). This in itself is a contested position.²⁴ Ideally the Scottish Parliament would also be under a duty to comply with the UNCRC. Nonetheless, there are other ways the Parliament, and in particular EHRiC, can seek to ensure compliance with UNCRC as part of the legislative process.
- 2.5. The Bill is silent on pre-legislative scrutiny of UNCRC compliance. There is an obligation on the Scottish Ministers to produce a statement of compatibility (section 8), however this is in and of itself is insufficient to constitute robust pre-legislative scrutiny. The Scottish Parliament and each of the Committees should have procedures in place to ensure that pre-legislative scrutiny is exercised across the work of Parliament. This is a particularly important accountability mechanism in a unicameral legislature. For example, when an Education Bill comes before the Education Committee how will UNCRC compliance be scrutinised, and will it be supported with sufficient resources and legal expertise? The EHRiC may therefore wish to consider how best to embed and support UNCRC compliance across the work of Parliament. **I would recommend the EHRiC ensure the implementation and build on the recommendations of the Committee’s ‘Getting Rights Right’ report.**²⁵ **There should be education programmes for parliamentarians, as well as legal support for MSPs to scrutinise compliance. The Financial Memorandum does not contain resources to support this at present.**
- 2.6. **In relation to the role of the executive**, the Bill should ensure that decision-making processes embed compliance with the UNCRC early on. The Bill seeks to do this through the deployment of the Children’s Rights Scheme (section 11), child rights impact and wellbeing assessments, through existing reporting procedures, and by making it unlawful for public authorities to act unlawfully with UNCRC . I cannot emphasise enough the importance of skilling-up, supporting and resourcing decision-making processes to ensure that decision makers and duty bearers make decisions that are informed, evidence based and oriented towards UNCRC compliance. The Financial Memorandum states that a team within SG will produce guidance to support public authorities and that £835000 will be available for implementation. £85000 of this fund is dedicated to co-design of an innovative implementation programme that includes participation of children and families. £750000 is available to support capacity-building and awareness-raising for practitioners and senior leaders in public services. This is welcome expenditure to support implementation. Given that this is a new human rights framework it is **imperative that this work includes appropriate expertise on international human rights law, budgeting, economic and social rights and participation**. Further work will require to be undertaken to ensure that decision makers and duty bearers understand the duties that the Bill imposes – significant support from

²⁴ The Scottish Parliament cannot enact legislation that modifies section 29 of the Scotland Act 1998 as it is a protected enactment (Schedule 4 Scotland Act 1998). However, in providing a definition of what constitutes ‘modification’ the Supreme Court stated ‘the protected enactment has to be understood as having been in substance ‘amended, superseded, disapplied or repealed by the later one’ *The UK Withdrawal From The European Union (Legal Continuity) (Scotland) (rev 2)* [2018] UKSC 64 (13 December 2018) para.50-51. It is not entirely clear whether further restricting the competence of the SP at least on a temporary basis through an ASP would be considered to be ‘modification’ through an amendment, or simply supplementing the protected enactment.

²⁵ Scottish Parliament Equality and Human Rights Committee (SP EHRiC), *Getting Rights Right: Human Rights and the Scottish Parliament*, November 2018, available at <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EHRiC/2018/11/26/Getting-Rights-Right--Human-Rights-and-the-Scottish-Parliament-3/EHRiCS052018R6Rev.pdf>

leading human rights experts should be included in the implementation plan. For example, over and above the Scheme, impact assessments and the reporting procedures, the Bill requires a duty to act compatibly – **and this will require to taking positive steps to progress children’s rights**. Further, in relation to Articles 24-32 the economic and social rights protected in the treaty will require the Scottish Ministers and public authorities to ensure the following progressive²⁶ and immediate²⁷ duties are met, including:

- The duty to ‘take steps’ to realise the rights (to have a strategy and substantive steps in place to realise rights)
- The duty to respect (refrain from interference), protect (ensure others respect), fulfil (take positive steps to realise) rights
- The duty to meet the minimum core obligation (some rights have a non-derogable core below which no child should fall)
- Non-discrimination duty (ensuring equal enjoyment of rights – requires data gathering, disaggregation and prioritisation – how to ensure positive steps to promote rights of children with different equality characteristics)
- The duty to deploy the maximum available resources and to budget in a way that is effective, efficient, adequate and equitable
- Limitations and non-regression on rights (right can be qualified in certain circumstances. Any derogation requires to be reasonable, proportionate, non-discriminatory, temporary, that it does not breach the minimum core obligation and that all other potential alternatives were considered. In the case of the UNCRC, also requires the children’s expressed views should be considered and that where retrogressive measures are taken children are the last to be affected, especially children in vulnerable situations²⁸)
- Duty to provide an effective remedy (as discussed above and further below)²⁹

2.7. The Children’s Rights Scheme (section 11) will help the Scottish Ministers go part of the way to meet the above obligations. However, in its existing format the Bill requires that the Scottish Ministers ‘may’ make arrangements for the following: (a) participation of children in decisions that affect them; (b) raise awareness of and promote the rights of children; (c) consider the rights of children in the SG budget process. Each of these duties form part of the obligations under UNCRC and so form compulsory, rather than discretionary, components of UNCRC compliance (**i.e. ‘may’ should be replaced by ‘shall’ in section 11(3)(a)**). Further, if the Bill explicitly mentions some of the duties required to comply with the UNCRC it should be made clear that **the duties set out in section 11(3) are not exhaustive**. For example, in relation to the economic and social rights under the Bill the Scottish Ministers will also require to meet the duties set out in para.2.6 above.

²⁶ Progressive realisation is read into the obligations of UNCRC with reference to Article 2(1) ICESCR by the UN Committee on the Rights of the Child, *General Comment No.5*, para 7. For a discussion on this see Aoife Nolan, ‘Children’s Economic and Social Rights’, in Kilkelly, U. and Liefgaard, T. (eds) *International Human Rights of Children* (Springer 2019).

²⁷ UN Committee on the Rights of the Child (CRC), *General comment No. 19 (2016) on public budgeting for the realization of children’s rights (art. 4)*, para.29. See also Nolan, *ibid*.

²⁸ Nolan, *ibid*. General Comment 19, para.32

²⁹ The economic and social rights in the UNCRC mirror to a certain degree the rights enshrined in the International Covenant on Economic, Social and Cultural Rights. However, as explained by Nolan (*ibid*), they are not an exact mirror image with the UNCRC providing more child specific ESR provisions. Understanding the UNCRC ESR duties will require drawing on international expertise to ensure interpretation is in line with treaty obligations.

2.8. Likewise, the reporting duty for listed authorities under section 15 may help public authorities to integrate and implement their duties under the Bill but the reporting procedures do not constitute a threshold of compliance with UNCRC – i.e. all public authorities including those not listed under 15(1) will need to be pro-active in taking positive steps to fulfil rights in relation to all of their work, including with reference to the duties set out in para.2.6 above. More clarification on how public authorities will be supported to achieve this should be sought.

2.9. RECOMMENDATIONS:

2.10. *Build in international expertise to existing plans around implementation. The Scottish Parliament, Scottish Government and public authorities will require support from international human rights experts, including legal expertise, to understand how to meet their obligations under UNCRC.*

2.11. *EHRiC and the Scottish Government should reflect on how to embed UNCRC compliance into the every day practice of the Scottish Parliament. Pre-legislative scrutiny should be enhanced, building on the Committee's 'Getting Rights Right' report.³⁰ There should be education programmes for parliamentarians, as well as legal support for MSPs to scrutinise compliance. The Financial Memorandum does not contain resources to support this at present.*

2.12. *Public authorities will require support to fulfil their positive obligations that is informed by appropriate expertise on international human rights law, budgeting, economic and social rights and participation.*

2.13. *Replace 'may' with 'shall' in section 11 to make the arrangements compulsory rather than discretionary.*

3. What more could the Bill do to make children's rights stronger in Scotland?

3.1. The Bill should go further in addressing access to justice for violations of UNCRC.

3.2. The Bill must be supported alongside mechanisms that facilitate access to justice and access to effective remedies for violations of UNCRC. As discussed in section 1 – without access to effective remedies the rights in the Bill can be rendered meaningless. This requires a renewed focus on what access to justice means for children in Scotland – there is a significant gap in understanding and in practice in relation to access to justice. Access to justice must go beyond considerations about access to the legal system and should constitute the full adjudication journey including access to an effective remedy as an outcome of a legal process. The Bill does not address this area in its entirety and the Committee may wish to ask how access to justice will be supported following enactment. The following principles³¹ should be addressed to ensure that the new framework meets best practice:

³⁰ Scottish Parliament Equality and Human Rights Committee (SP EHRiC), Getting Rights Right: Human Rights and the Scottish Parliament, November 2018, available at <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EHRiC/2018/11/26/Getting-Rights-Right--Human-Rights-and-the-Scottish-Parliament-3/EHRiCS052018R6Rev.pdf>

³¹ These principles are drawn from deliberative democracy theory as developed in Katie Boyle, *Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020)

- **Principle of accessibility:** *Every child should have the right to access the legal system.*
 - Do children have sufficient access to legal aid? The Policy Memorandum suggests there are gaps in legal aid provision, including outdated means tested rules (para.100) and that this will be addressed in the Legal Aid Reform Bill. It is important that it is clear how a joined-up approach to access to justice will be secured. Is it possible that access to legal aid for children will continue to emerge as a gap in provision? If so access to justice under the Bill will be undermined.
 - Is standing sufficiently broad? The Policy Memorandum suggests that 'the ordinary rules about who can bring cases in court would apply to claims brought under the Bill'.³² Under the ECHR there is a 'victimhood' test that limits what cases can be brought under the HRA and SA.³³ It is important that the broadest definition of standing should be adopted to facilitate standing for every child and to support public interest litigation where appropriate (where a third party can raise proceedings to challenge an unlawful act of omission). **The sufficient interest test should be adopted.**
 - The role of the Commissioner to bring or intervene proceedings is welcome (section 10).
- **Principle of participation:** *Every child should have the right to participate in the decisions that impact them, including in court proceedings and remedies.*
 - Are there sufficient procedures in place to ensure children are able to participate in administrative law proceedings, including judicial review, complaints procedures, ombuds processes and independent inquiries?
 - Are there sufficient mechanisms in place to support advocacy?
 - Are there sufficient mechanisms in place to ensure children can participate in developing the remedies issued by the court?
 - Does the legal system ensure bridges to address language or digital divide for children?
 - Are group proceedings available to address systemic issues? For example, if many children face the same systemic issue can they raise proceedings collectively? Does the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 facilitate child friendly group proceedings?
- **Principle of fairness:** *every child has the right to fair process as well as the right to the enforcement of substantive outcomes in the enjoyment of their rights. Courts require to adapt to new methods of review to adjust to economic and social rights adjudication.*
 - *Wednesbury* reasonableness (irrationality) is insufficient to meet the international test utilised in the review of international human rights compliance of economic and social rights. The UK *Wednesbury* reasonableness test requires an action (or omission) to be 'so outrageous and in defiance of logic...that no sensible person who had applied his mind to the question ... could have arrived at it.'³⁴ This degree of review means that the onus of proving 'unreasonableness' rests with the applicant and

³² Para.132

³³ Article 34 ECHR

³⁴ *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374

that the court requires a high degree of 'irrationality' to find a matter unreasonable. It is a high threshold. Reasonableness review of ECHR compliance is a test that sets a threshold of 'manifestly without reasonable foundation' in a way that is 'manifestly disproportionate to the legitimate aim pursued'.³⁵ Reasonableness review in ECHR case law has therefore been expanded to include a degree of proportionality, or what is understood as a balancing exercise between the action or mistreatment and the legitimate aim pursued. Reasonableness review in international human rights law (IHRL) is broader again. According to IHRL, reasonableness review of UNCRC compliance may include whether the public authority acted in a way that is coherent, balanced, flexible, comprehensive, non-discriminatory, participative, transparent, effective, efficient, adequate (with reference to quality of service), within a reasonable time frame, in a way that prioritises the most marginalised, and deploying the maximum available resources to achieve the aim. This wider definition requires much more of a public authority than *Wednesbury* reasonableness. Unless a more expansive test is explicitly included in the Bill courts may adopt the more restrictive test, thus undermining compliance with the UNCRC.

- How can courts give meaning to UNCRC rights? Courts should deepen the substance and content of rights with reference to international human rights law to aid interpretation (including the UN treaties, treaty body decisions – including decisions under UNCRC Optional Protocol on a Communications Procedure, General Comments and recommendations) as well as comparative law when interpreting rights. **This requires explicit recognition in section 4.**
- **Principle of deliberation.** *The court is an important accountability mechanism in a multi-institutional framework. This means it should be involved in dialogue with the parliament and government, in addition to other domestic and international stakeholders such as ombudsmen, international courts and UN Committees as well as rights holders themselves.*
 - The existing remedies under the Bill provide useful mechanisms for dialogue (section 6 – mirrors s29 SA and s6 HRA); (section 19 – mirrors section 3 HRA/ section 101 SA); (sections 20 – mirrors ultra vires declaration under section 29 SA); (section 20(5) mirrors section 102 SA). (section 21 – mirrors section 4 HRA); (Part 6 – mirrors Schedule 2 HRA).
 - The court should also be responsive and engage with international law. This means responding to and interpreting UNCRC rights in light of other UN treaties, treaty body decisions, General Comments and recommendations as well as other comparative law.
 - Amicus curiae (friend of the court) should be encouraged when courts are reviewing compliance with a new rights framework. This should include international expertise where appropriate.
 - Children should be involved in deliberation of their rights, this requires meaningful participation in the decisions that impact them, including remedies.

³⁵ *Blecic v Croatia* (2005) 41 EHRR 13, para 65, applied in *In re McLaughlin* [2018] 1 WLR 4250, Lady Hale at para.38–39 and Lord Hodge, para.83

- **Counter-majoritarian principle.** *The court should act as an institutional voice for marginalised children, ensuring that the interpretation of UNCRC does not create or exacerbate structural inequalities.*
 - The legal system should facilitate public interest litigation and group proceedings for systemic issues.
 - Can the socio-economic equality duty help the court exercise its functions ‘in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage’?³⁶
- **Remedial Principle (access to an effective remedy).** *Every child has the right to an effective remedy for a violation of a right.*
 - In international law, effective remedies can include, amongst other things: restitution, compensation, rehabilitation, satisfaction, effective measures to ensure cessation of the violation and guarantees of non-repetition. Specific remedies beyond compensation include: public apologies, public and administrative sanctions for wrongdoing, instructing that human rights education be undertaken, ensuring a transparent and accurate account of the violation, reviewing or disapplying incompatible laws or policies, use of delayed remedies to facilitate compliance, including rights holders as participants in development of remedies and supervising compliance post-judgment.
 - Access to justice must adapt to new procedures to facilitate legal redress for UNCRC rights. This should include a participative process where children and families can contribute to a definition of what constitutes an effective remedy for a breach.
 - It should be clear on the face of the Bill that remedies require to be effective.
 - Further attention is required to reflect on systemic issues and structural remedies. Structural remedies are deployed in cases where many children are facing the same systemic issue. Structural remedies can include multiple orders directed at different duty bearers to address a systemic violation of UNCRC.

3.3. RECOMMENDATIONS:

3.4. *The Bill, or supporting statutory guidance, requires to engage with a broader focus on access to justice including engagement with the Legal Aid Reform Bill, the Children (Scotland) Act 2020 and the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.*

3.5. *Legal aid should be available for children to seek access to justice.*

3.6. *Standing should be based on the sufficient interest test.*

3.7. *Children should be able to participate in the development of remedies.*

3.8. *A broader reasonableness test should be adopted when reviewing compliance with UNCRC. Explicit clarification on the face of the Bill should be considered. This could be achieved by setting out ‘relevant considerations’ when assessing reasonableness including, where appropriate, whether the decision is sufficiently proportionate, coherent, balanced, flexible,*

³⁶ Section 1 Equality Act 2010

comprehensive, non-discriminatory, participative, transparent, effective, efficient, adequate (with reference to quality of service), within a reasonable time frame, prioritises the most marginalised, and deploying the maximum available resources to achieve the aim.

3.9. As above, section 4 should be expanded to include international human rights law to aid interpretation of UNCRC (including the UN treaties, treaty body decisions, General Comments and recommendations) as well as comparative law. This can be a duty to have regard, rather than a duty that confers binding authority to interpretative sources.

3.10. As above, it should be clear on the face of the Bill that remedies are 'effective'.

4. If you work for an organisation or public authority, what resources do you need to help children and young people access their rights? Will you require additional resources or training to implement the Bill, for example to make or respond to challenges in court?

4.1. N/A

5. Are there any relevant equalities and human rights issues related to this Bill, or potential barriers to rights, that you think we should look at?

5.1. Privatisation of services and compliance with UNCRC as a barrier to rights:

5.2. The definition of a public authority under the Bill lacks clarity. This means that the privatisation of services, in particular in relation to economic and social rights under UNCRC, may inadvertently prohibit access to an effective remedy for a violation of a right for children. As Palmer warns with regard to the UK approach, 'public law obligations, in particular human rights norms, should not be sidestepped because a government has chosen to contract out duties once unambiguously assumed by the state.'³⁷ Likewise, the UN Committee on the Rights of the Child provides that the 'process of privatisation of services can have a serious impact on the recognition and realisation of children's rights.'³⁸ The definition of the private sector, according to the Committee, includes 'businesses, NGOs and other private associations, both for profit and not-for-profit.'³⁹

5.3. Section 6(3)(a)(iii) of the Bill provides that a public authority includes any person certain of whose functions are functions of a public nature, but not including an act of that person if the nature of the act is private (section 6 (4)). This provision mirrors section 6 HRA.

5.4. The Policy Memorandum further clarifies that the definition of 'public authority' has been applied by public bodies and the courts for over 20 years and case law has developed which the Scottish Government considers provides a 'helpful and stable basis on which to base the definition in the Bill.'⁴⁰

5.5. The case law around performance of a public function lacks clarity. Without further clarity on the face of the Bill it may not be possible to ensure that services outsourced to private companies that provide services to children will be covered by the provision. This is because

³⁷ Stephanie Palmer, 'Public functions and private services: A gap in human rights protection', International Journal of Constitutional Law, Volume 6, Issue 3-4, July-October 2008, Pages 585-604

³⁸ General Comment 5 para.42

³⁹ *ibid*

⁴⁰ Para.123

case law has adopted a narrow, and at times arguably erroneous, definition of a private body performing a public function.⁴¹

- 5.6. Section 6 HRA sought to ensure that private bodies performing public functions would require to comply with the ECHR.⁴² However, in 2007 in the *YL v Birmingham*⁴³ case the House of Lords held that a private care home did not perform functions of a public nature and was not required to comply with the HRA.⁴⁴ The UK Parliament responded by enacting section 145 of the Social Care Act 2008 to clarify that private care homes are exercising a function of a public nature when providing accommodation and personal care. This is only a narrow expansion of the test meaning any other service outwith the scope of residential care would be subject to the narrow test applied in *YL*. This test has prevailed through subsequent case law (see below). Section 145 of the 2008 Act was repealed and replaced by section 73 of the Care Act 2014. In Scotland, section 73 of the 2014 Act provides that personal care in residential accommodation paid for by the local authority under sections 12, 13A, 13B and 14 of the Social Work (Scotland) Act 1968 meets the threshold of a function of a public nature and therefore engages section 6 of the HRA. This provision does not apply to children under 18 and excludes adults facing destitution subject to section 115 of the Immigration and Asylum Act 1999 (exclusion from benefits).
- 5.7. In subsequent case law the *YL* precedent has been reinterpreted and can be understood as constituting 'no single test of universal application.'⁴⁵ Case law has focussed in particular on four overarching factors⁴⁶ in the determination of whether a private provider performs a public function for the purposes of section 6 HRA thus constituting a 'hybrid' public authority:
- 5.8. First, is the service publicly funded? (if yes, it may engage section 6 but does not include a commercial contract where the motivation of the service provider is to secure profit); Second, does the service relate to the performance of a statutory function? (if yes, it may engage section 6 but does not include publicly funded contracts of a private nature such as for religious or commercial purposes); Third, is the private provider taking the place of central government or local authorities in providing a public service? (if yes, it may engage section 6 but must be 'governmental in nature'); Fourth, is the provision of the service a public service? (if yes, it may engage section 6 **but does not cover services provided by 'private schools, private hospitals, private landlords and food retailers'**).⁴⁷ The *YL* precedent means that there is a focus on the **motivation of the service provider** in the determination of the act. Thus, in the Scottish *Serco* case the **motivation of the service provider** to make profit superseded the performance of the **public function or service** to provide housing in a human rights compliant way.⁴⁸ An appeal to the Supreme Court was made in the *Serco* case, however, permission for appeal was refused. The 'motivation' precedent has now been set. This sets a worrying precedent for section 6 of the UNCRC (Incorporation) (Scotland) Bill.

⁴¹ The *SERCO* case for example, excluded the provision of housing to a 'failed asylum seeker' meaning the private company could evict families without compliance with the ECHR. *Ali, Appeal By Shakar Omar Ali Against (1) Serco Ltd, (2) Compass Sni Ltd And (3) The Secretary Of State For The Home Department* [2019] ScotCS CSIH_54

⁴² The Hansard records the Minister stipulating that the provision was intended to

⁴³ *YL v Birmingham City Council* [2007] UKHL 27

⁴⁴ *YL* *ibid*

⁴⁵ Lord Nicholls *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v. Wallbank & Anor* [2003] UKHL 37 at para.12

⁴⁶ See *R (Weaver) v London and Quadrant Housing Trust* [2010] 1 WLR 363 para.35-38

⁴⁷ *Ibid*

⁴⁸ *Ali v Serco* [2019] CSIH 54 at para.23

- 5.9. A tentatively broader definition of the four factor approach in *YL (2007)* (drawn from *Aston Cantlow (2004)*⁴⁹ and applied in *R (Weaver) (2010)*⁵⁰), is found in the case of *TH (2016)*⁵¹ and applied in *Cornerstone (2020)*⁵². In the *TH* case the court expands the four factors to include a further two questions: fifth, to what extent is the body democratically accountable?; and sixth, would the allegations, if made against the United Kingdom, render it in breach of its international law obligations? This expanded test would provide a much broader basis through which the UNCRC could continue to apply when private obligations of the state are contracted out. The leading case in Scotland did not consider the *TH* case in deliberations in either the Outer House or Inner House judgments. In the Outer House the court considered that Serco's service to provide housing to destitute asylum seekers was '*the implementation by the UK of its international obligations to provide essential services to destitute people seeking asylum*'.⁵³ On 12 April 2019 the court held that the provision of housing formed a function that is 'governmental in nature' (satisfying the third factor) and that Serco therefore constituted a hybrid body under HRA. However, on appeal in the Inner House on 13 November 2019, the court did not consider the international obligations dimension, neither in relation to the governmental nature of the duties, nor in relation to whether the allegations would render the UK in breach of its international obligations. Instead, Lady Dorrian concludes that '*the state cannot absolve itself of responsibility for such public law duties as the provision of accommodation to asylum seekers by delegating its responsibility to private bodies. If arrangements are made with a private company to provide accommodation, responsibility for the exercise of the public law duty is not delegated, but remains with the Home Secretary*'.⁵⁴ This 2019 judgment adopts a much narrower definition of the 2007 *YL* precedent than in subsequent case law, including *Cornerstone (2020)*, *TH (2016)* and *LW v Sodexo (2019)*.⁵⁵ In the latter of these cases the court found that the Secretary of State for Justice had failed in his duty to provide adequate or effective supervision or monitoring of strip searching of female and transgender prisoners to ensure compliance with Article 8 and Article 3 ECHR. In this case, the private contractor, *Sodexo Ltd* had already settled out of court conceding that it owed the claimants positive obligations to ensure ECHR compliant search procedures under the ECHR.⁵⁶ Thus, both the private contractor (the hybrid public authority) and the Secretary of State had obligations under the ECHR by virtue of the HRA.
- 5.10. By mirroring section 6 of the HRA the Bill adopts a definition of public authority that is both contested and lacking in clarity because of the oscillating positions adopted in case law in Scotland and other parts of the UK. It does not meet the 'helpful and stable basis' as per para.123 of the Policy Memorandum.
- 5.11. This runs contrary to the expectations of treaty implementation. The UN Committee on the Rights of the Child emphasises that non-state (private) service providers must operate in accordance with the treaty, thus creating indirect obligations on such actors. Further, '*the Committee emphasizes that enabling the private sector to provide services, run institutions*

⁴⁹ *Aston Cantlow*

⁵⁰ *R (Weaver)*

⁵¹ *TH v Chapter of Worcester Cathedral, Bishop of Worcester in his Corporate Capacity v Worcestershire County Council* [2016] EWHC 1117 (Admin)

⁵² *The Queen on the Application of Cornerstone (North East) Adoption and Fostering Service Ltd v The Office for Standards in Education, Children's Services and Skills* [2020] EWHC 1679 (Admin). This judgment was delivered on 7 July 2020 and there is an appeal outstanding.

⁵³ *Ali v Serco* [2019] CSOH 34 at para.31

⁵⁴ *Ali v Serco* 2019 CSIH 54

⁵⁵ *LW v Sodexo Ltd, Secretary of State for Justice* [2019] EWHC 367 (Admin)

⁵⁶ *Ibid* at para.4

*and so on does not in any way lessen the State's obligation to ensure for all children within its jurisdiction the full recognition and realization of all rights in the Convention.'*⁵⁷

5.12. Under Article 4 of the UNCRC there is an expectation that the state implement legislative, administrative or other means to ensure regulation of the private sector. The Bill offers an opportunity to fulfil this requirement. Indeed, the Committee on the Rights of the Child has raised concerns that the implementation of UNCRC is often impeded by the inability or unwillingness of States to adopt measures under article 4 to ensure respect for the provisions of the Convention by actors in the private sphere.⁵⁸ The Committee's view is that the state has responsibility for implementation of the treaty, and that as part of the state should ensure private services providers operate in accordance with its provisions, thus creating indirect obligations on such actors.⁵⁹ The state continues to be bound by its obligations, even when the provision of services is delegated to non-state actors.⁶⁰ This means both the state (in the UNCRC Bill 'public authorities') retain responsibility for UNCRC compliance when contracting out public services, and that there is an additional obligation to ensure private service providers also comply.

5.13. RECOMMENDATIONS:

5.14. *The Bill offers an opportunity to adopt a clearer and broader approach to the interpretation of a 'hybrid' public authority as developed in case law in relation to the application of section 6 HRA. If the narrow definition is to prevail private bodies that enter into contracts to provide services such as housing, sheltered accommodation, immigration services, education support, provision of food/ school meals, health services, provision of care/ adoption or fostering services, social security related services, among other examples, may not be required to comply under the existing narrow interpretation. This falls short of international human rights law requirements.*

5.15. *The Bill could adopt an approach similar to the Equality Act 2010. Section 29 of the Equality Act 2010 provides "a person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service." Lessons can be learned from the operation of section 29 of the Equality Act 2010, by way of example. This would require an amendment that a person (whether public or private) who performs a service to children that engages with rights under UNCRC would be required to comply with rights under the Bill.*

5.16. *An alternative is to ensure that the additional 'international law obligation' factor adopted in TH and Cornerstone is included on the face of the Bill. In other words if the allegation amounts to a breach of the state's obligations under the UNCRC then the service in question can be considered to constitute a public function for the purposes of the Bill.*

5.17. *Finally, if a narrower definition prevails, the Bill could require that any public authority that delegates in part or in whole the provision of services under its public functions must require, as part of its contractual arrangements, that the private body provide the service to children in a UNCRC compliant way. This would result in horizontal application of UNCRC compliance.*

⁵⁷ General Comment 5

⁵⁸ UN Report of the Committee on the Rights of the Child, General Assembly Official Records Fifty-ninth Session Supplement No. 41, General Thematic Discussion, A/59/41 at para.43

⁵⁹ Ibid at para.45.1

⁶⁰ Ibid

Indeed, it would ensure that public authorities take positive steps to regulate any commercial activity in the provision of services to ensure that children's rights continue to be respected. This approach is similar to the Fair Work Wales initiative that seeks to ensure public money should be provided only to organisations fulfilling the characteristics of fair work and that the focus and priorities of public sector contracting should shift towards social value, including fair work.⁶¹ In other words, public money used to provide services to children via private providers should ensure UNCRC compliant outcomes and should be regulated through contractual provisions/ procurement rules and through monitoring and supervision of the private body in its performance of the service.⁶² The outstanding problem with this approach is that it may undermine access to justice for the rights holder who is not a party to the contract (unable to enforce contractual terms) and cannot initiate judicial review proceedings against the private body (if the narrow definition of public authority prevails).

1. What are your views on the provisions in the Bill that allow the courts to strike down legislation judged to be incompatible with the UNCRC?

6.1 Please see sections 1 and 2.

7. What are your views on the Children's Rights Scheme and the requirement on public authorities to report?

7.1 Please see section 2.

8. Is there anything else you want to tell us about the Bill?

8.1 N/A

⁶¹ Fair Work Wales, Report of the Fair Work Commission, March 2019
<https://gov.wales/sites/default/files/publications/2019-05/fair-work-wales.pdf> para.18

⁶² See *LW v Sodexo*