

# Law Society of Scotland Memorandum of Comments

## On Scottish Government Amendments to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill – Reconsideration Stage

October 2023

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### Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Constitutional Law and Human Rights Subcommittee and Child and Family Sub-Committee welcome the opportunity to comment on the Scottish Government Amendments to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill – Reconsideration Stage. These committees have the following comments to put forward for consideration.

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### General Comments on the Amendments

Under the Scotland Act 1998 ("the Scotland Act") section 33 the Advocate General for Scotland, the Lord Advocate and the Attorney General for England and Wales can refer to the United Kingdom Supreme Court the question of whether any provision of a Bill passed by the Scottish Parliament would be within the legislative competence of the Parliament.

The Advocate General and the Attorney General referred questions to the Supreme Court in respect of two Bills passed by the Scottish Parliament in March 2021: the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill ("the UNCRC Bill") and the European Charter of Local Self-Government (Incorporation) (Scotland) Bill. This Memorandum of Comments is only concerned with the UNCRC Bill which was proposed to give effect in Scots law to a treaty to which the UK is a signatory. The references concerned the manner in which the Bill sought to incorporate the UNCRC into Scots law and argued that the Bill breaches the legislative competence of the Scottish Parliament under the Scotland Act. The Supreme Court unanimously decided that sections 6, 19(2)(a)(ii), 20(10)(a)(ii) and 21(5)(b)(ii) of the UNCRC Bill were outside the legislative competence of the Scottish Parliament.

The Scottish Government has brought forward amendments which seek to address the Supreme Court's

findings. The Cabinet Secretary has acknowledged that the Scottish Government’s approach to amending the Bill in light of the Supreme Court decision “will inevitably result in far less coverage for the compatibility duty than we originally hoped to achieve.”<sup>1</sup> . The duty will not follow the nature of the function being performed – i.e. devolved or reserved – but rather the legal source of the power being exercised. Given that key pieces of legislation in devolved areas affecting children are Acts of the UK Parliament, this approach may exclude portions of public authority functions from the scope of the Bill. It may focus attention on questions of whether the section 6 duty applies rather than on what it requires in order to comply with the UNCRC. With regard to this balance, and the approach that the Scottish Government have taken, stakeholders have expressed a range of views on the approach adopted by the Scottish Government, and on the possible impacts this may have on drafting styles in the future.

Notwithstanding our comments on the amendments, it is for the Parliament and the Scottish Government to take their own legal advice on what content their amendments to the Bill should have and their effect.

We are also conscious of the landscape in terms of resourcing, pressures, finances and capacity, and of calls for an audit of which laws fall within and outwith scope of the Bill as amended. Others will be better placed to comment on these issues, and we would be happy to comment further on this at a later stage, should Scottish Government be minded to take that path.

Others will also be best placed to comment on how we move forward and the practicalities of this. In practice, we would stress the importance of sufficient resourcing, training and capacity building.

We seek to comment on each amendment contained in the Daily List dated 18 September 2023.<sup>2</sup>

## Section 6

1. In section 6, page 4, line 33, leave out <for public authority to act> and insert <(subject to subsection (1C)) for a public authority to act, or fail to act, in connection with a relevant function>

## Our Comment

The UK Supreme Court considered 4 questions concerning the bill. The fourth question was about section 6 of the Bill, which on its face was outside the competence of the Scottish Parliament. The question is whether it can be interpreted in such a way as to be within competence, by applying section 101(2) of the Scotland Act. The Court came to the view that “Section 6 of the Bill is outside the legislative competence of the Scottish Parliament, because it “relates to” reserved matters, contrary to section 29(2)(b) of the Scotland Act, would modify section 28(7), contrary to section 29(2)(c), and would modify the law on reserved matters, contrary to section 29(2)(c).<sup>3</sup>

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<sup>2</sup> [Daily List 18/09/2023 \(parliament.scot\)](#)

<sup>3</sup> see Paragraphs 80 and 90, [REFERENCES \(Bills\) by the Attorney General and the Advocate General for Scotland - United Nations Convention on the Rights of the Child and European Charter of Local Self-Government \(Incorporation\) \(Scotland\) \(supremecourt.uk\)](#)

The aim of these amendments is to ensure that functions which could competently be conferred by the Scottish Parliament but which are conferred by legislation originating from the UK Parliament rather than the Scottish Parliament are not subject to the section 6 compatibility duty.<sup>4</sup>

Amendment 1 amends section 6 of the bill and seeks to ensure that it is unlawful, subject to section 1(C) for a public authority to act, or fail to act, in connection with a relevant function. “Relevant function” is defined in new subsection (1A) as, a function which is within the legislative competence of the Scottish Parliament to confer by an ASP, an SSI, another provision of an SSI partly made under an enabling power, or a rule of law not created by an enactment.

It will be relatively easy to identify functions contained in (1A)(a) or (b)(i) or (ii).

It is not easy, notwithstanding the terms of new subsection (1B) to identify a relevant SSI of the type described under new subsection 1(A)(b)(iii). Perhaps the Scottish Ministers can identify such instruments?

We understand that the drafting of subsection (1A) and (1B) is intended to ensure that a compatibility duty does not arise from a function conferred by an SSI made under a text inserted by a UK Act into an Act of the Scottish Parliament (ASP) or made under a text inserted by an ASP into a UK Act.

It is to be noted that the expression “relevant enabling power” also appears in section 23B where its intended effect might be said to be clearer.

A rule of law not created by an enactment would be a rule created by case law ie the decisions of the courts.

**2.** In section 6, page 4, line 34,  
at end insert—

<(1A) In subsection (1), a “relevant function” means a function that—

- (a) it is within the legislative competence of the Scottish Parliament to confer on the authority, and
- (b) is conferred by—
  - (i) an Act of the Scottish Parliament,
  - (ii) a Scottish statutory instrument originally made wholly under a relevant enabling power,
  - (iii) a provision in a Scottish statutory instrument originally made partly under a relevant enabling power, provided that the provision itself was either—
    - (A) originally made under the relevant enabling power, or
    - (B) inserted into the instrument by an Act of the Scottish Parliament or subordinate legislation made under a relevant enabling power, or
- (1v) a rule of law not created by an enactment

(1B) In subsection (1A), “relevant enabling power” means a power to make subordinate legislation conferred by a provision in an enactment of a kind mentioned in that subsection, unless the provision was inserted by an enactment of a kind that is not mentioned in that subsection.

(1C) But subsection (1) does not make unlawful doing or failing to do something if the authority was required or entitled to act in that way by words that—

(a) are not contained in an enactment of a kind mentioned in subsection (1A)(b), or

(b) are contained in such an enactment having been inserted into it by an enactment of a kind that is not mentioned in subsection (1A)(b).>

## Our Comment

See our comments above.

3. In section 6, page 4, line 35, leave out subsection (2)

## Our Comment

This is a consequential amendment required by the inclusion of “or fail to act” in amendment 1.

## Section 19

4. In section 19, page 16, line 28, leave out <legislation mentioned in subsection (2)> and insert <the following>

## Our Comment

This amendment paves the way for the restriction of section 19 to those provisions referred to in amendment 5.

Section 19(1) provided that legislation which would be in the competence of the Scottish Parliament to make must be read and given effect in a way which is compatible with the UNCRC requirements.

Legislation is defined in subsection (2)(a)(i) as an Act of the Scottish Parliament and in subsection (2)(a)(ii) as an Act of Parliament.

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<sup>5</sup> paragraph 36: [REFERENCES \(Bills\) by the Attorney General and the Advocate General for Scotland - United Nations Convention on the Rights of the Child and European Charter of Local Self-Government \(Incorporation\) \(Scotland\) \(supremecourt.uk\)](#) .

5. In section 19, page 16, line 30, leave out subsections (2) and (3)

The first question referred to the UK Supreme Court was: Whether section 19(2)(a)(ii) of the Bill is outside the legislative competence of the Scottish Parliament because it modifies section 28(7) of the Scotland Act and is accordingly in breach of the restriction in paragraph 4(1) of Schedule 4, falling under section 29(2)(c) of the Scotland Act. The Court's reasoning is contained in paragraphs 23-36 of the judgment and concluded that, "Section 19(2)(a)(ii) of the Bill is outside the legislative competence of the Scottish Parliament, because it would modify section 28(7) of the Scotland Act, contrary to section 29(2)(c)"<sup>5</sup>

6. In section 19, page 16, line 29, at end insert—

<( ) words in an Act of the Scottish Parliament to which section (*Primary legislation words to which this Part applies*) applies,

( ) words in subordinate legislation to which section (*Subordinate legislation words to which this Part applies*) applies.>

## Our Comment

This amendment restricts the provisions of section 19 to words in an Act of the Scottish Parliament (see amendment 33 which inserts a new section entitled *Primary legislation words to which this Part applies*) and words in subordinate legislation (see amendment 34 which inserts a new section entitled *Subordinate legislation words to which this Part applies*).

Presumably, the use of 'words' here is about avoiding any suggestion of impact on UK legislation, but it is not entirely clear how 'words' differ from 'provisions'. An explanation of the reasoning behind this drafting would be beneficial.

## Our Comment

This amendment deletes section 19 subsections (2) and (3) and is consequential upon the decision of the UK Supreme Court.

7. In section 19, page 17, line 6, leave out <or Act of Parliament>

## Our Comment

This amendment deletes section 19 subsections (4)(a) and is consequential upon the decision of the UK Supreme Court.

8. In section 19, page 17, line 7, leave out from <enactment> to <legislation"> in line 9 and insert

<subordinate legislation by virtue of an Act of the Scottish Parliament>

## Our Comment

The effect of amendments 8 and 9 is to amend section 19 so it reads: *Subsection (1) does not affect— (b) the validity, continuing operation or enforcement of any incompatible enactment if (disregarding any possibility of revocation) the Act or words in another enactment to which neither section (Primary legislation works to which this Part applies) nor (Subordinate legislation works to which this Part applies) apply prevents removal of the incompatibility.*

These amendments are consequential on the deletion of section 19(2).

9. In section 19, page 17, line 10, leave out <primary legislation> and insert <Act or words in another enactment to which neither section (*Primary legislation works to which this Part applies*) nor (*Subordinate legislation works to which this Part applies*) apply>

## Our Comment

We refer to our comment regarding amendment 8.

## Section 20

10. In section 20, page 17, line 12, leave out <a provision of relevant legislation is compatible> and insert <any of the following give rise to an incompatibility>

## Our Comment

Section 20 concerned “strike down declarators” Such declarators were designed to allow a court to strike down certain kinds of legislation if it found that legislation to be incompatible with the UNCRC requirements.

The second question referred to the Supreme Court was: Whether section 20(10)(a)(ii) of the Bill is outside the legislative competence of the Scottish Parliament because it modifies section 28(7) of the Scotland Act and is accordingly in breach of the restriction in paragraph 4(1) of Schedule 4, falling under section 29(2)(c) of the Scotland Act. The Court stated that “section 20 enables the courts to strike down and invalidate provisions of Acts of Parliament which are incompatible with the UNCRC requirements, provided they were enacted before section 20 comes into force.” paragraph 40. The Court’s answer to question 2 was “Yes”.

Section 20(10)(a)(ii) of the Bill was outside the legislative competence of the Scottish Parliament, because it would modify section 28(7) of the Scotland Act, contrary to section 29(2)(c).

Amendment 10 and subsequent amendments are designed to avoid section 20 being subject to the same challenge as before. The amendments do this by limiting the scope of section 20 to words, which are in a pre-commencement Act of the Scottish Parliament

or subordinate legislation made under such and Act or in either of the two new sections on Primary legislation words to which this Part applies and Subordinate legislation words to which this Part applies.

**11.** In section 20, page 17, line 13, at end insert—

<( ) words—

(i) that are in a pre-commencement Act of the Scottish Parliament, and

(i) to which section (*Primary legislation words to which this Part applies*) applies,

(ii) or ( ) words—that are in subordinate legislation made by virtue of a pre-commencement Act of the Scottish Parliament, and

(iii) to which section (*Subordinate legislation words to which this Part applies*) applies.>

## Our comment

See our comment above.

**12.** In section 20, page 17, line 14, leave out < provision is incompatible> and insert <words give rise to an incompatibility>

## Our Comment

See our comment above.

**13.** In section 20, page 17, line 15, leave out <the provision ceases> and insert <they cease>

## Our Comment

See our comment above.

**14.** In section 20, page 17, line 15, leave out <of> and insert <that they give rise to>

## Our Comment

See our comment above.

**15.** In section 20, page 17, line 17, leave out from <provision> to <legislation> in line 18 and insert <words are in subordinate legislation>

## Our Comment

See our comment above.

**16.** In section 20, page 17, line 18, leave out from <an> to <legislation"> in line 19 and insert <a pre- commencement Act of the Scottish Parliament>

## Our Comment

See our comment above.

**17.** In section 20, page 17, line 19, after <court> insert—

<( )>

## Our Comment

This is a paving amendment.

**18.** In section 20, page 17, line 20, leave out <the subordinate legislation> and insert <them>

## Our Comment

See our comment above.

**19.** In section 20, page 17, line 21, leave out <primary legislation> and insert <Act>

## Our Comment

See our comment above.

**20.** In section 20, page 17, line 22, at end insert <, ( ) may not make a strike down declarator in relation to them if the court is satisfied that (disregarding my possibility of revocation) words in another enactment to which neither section (*Primary legislation words to which this Part applies*) nor (*Subordinate legislation words to which this Part applies*) apply prevent removal of the incompatibility.>

## Our Comment

This amendment provides that the court may not strike down legislation if other legislation prevents removal of an incompatibility. Can the Scottish Ministers provide an example of such a provision?

**21.** In section 20, page 17, line 24, leave out <under the provisions>

## Our Comment

We have no comment to make.

**22.** In section 20, page 17, line 38, at end insert—

<(9A) In this section, a reference to a pre-commencement Act of the Scottish Parliament—

(a) means an Act of the Scottish Parliament the Bill for which received Royal Assent before the day on which this section comes into force, and

(b) refers to such an Act as at the day on which this section comes into force.>



## Our Comment

This is a clear explanation of what is a pre-commencement Act of the Scottish Parliament.

**23.** In section 20, page 17, line 39, leave out subsections (10) to (12)

## Our Comment

This amendment removes the remaining provisions of the bill which refer to Acts of Parliament and the Bill having extra-territorial reach.

### Section 21

**24.** In section 21, page 18, line 17, leave out <a provision of future legislation is compatible> and insert

<any of the following give rise to an incompatibility>

## Our Comment

Section 21 sought to allow a court to declare certain legislation (including an Act of the UK Parliament or legislation made by virtue of ...an Act of Parliament) to be incompatible with the UNCRC requirements, where it had found it impossible to interpret the legislation compatibly with those requirements in accordance with section 19. An incompatibility declarator can be made is legislation that cannot be struck down under section 20 because it is enacted on or after the day that section came into force.

The third question referred to the UK Supreme Court was: Whether section 21(5)(b)(ii) of the Bill is outside the legislative competence of the Scottish Parliament because it modifies section 28(7) of the Scotland Act and is accordingly in breach of the restriction in paragraph 4(1) of Schedule 4, falling under section 29(2)(c) of the Scotland Act.

The Court's answer to question 3 was that Section 21(5)(b)(ii) of the Bill was outside the legislative competence of the Scottish Parliament, because it would modify section 28(7) of the Scotland Act, contrary to section 29(2)(c).

**25.** In section 21, page 18, line 18, at end insert—

<( ) words—

- (i) that are in a post-commencement Act of the Scottish Parliament, and
- (i) to which section (*Primary legislation words to which this Part applies*) applies, ( ) words—that are in a pre-commencement Act of the Scottish Parliament, having been inserted on or after the day section 20 comes into force, and
- (ii) to which section (*Primary legislation words to which this Part*

*applies*) applies, ( ) words—

- (i) that are in subordinate legislation made by virtue of a post-commencement Act of the Scottish Parliament, and

(ii) to which section (*Subordinate legislation words to which this Part*

*applies*) applies,

(i) ( ) words—

(ii) that are in subordinate legislation made by virtue of a provision that was inserted, on or after the day section 20 comes into force, into a pre-commencement Act of the Scottish Parliament, and

(iii) to which section (*Subordinate legislation words to which this Part applies*) applies.>

## Our Comment

These amendments have the same effect as previous similar amendments.

**26.** In section 21, page 18, line 19, leave out <provision is incompatible> and insert <words give rise to an incompatibility>

## Our Comment

See our comment above.

**27.** In section 21, page 18, line 21, leave out from <provision> to <legislation"> in line 23 and insert < words are in subordinate legislation>

## Our Comment

See our comment above.

**28.** In section 21, page 18, line 23, after <court> insert— <( )>

## Our Comment

This is a paving amendment.

**29.** In section 21, page 18, line 26, at end insert <, ( ) may not make an incompatibility declarator in relation to the subordinate legislation if the court is satisfied that (disregarding any possibility of revocation) words in another enactment to which neither section (*Primary legislation words to which this Part applies*) nor (*Subordinate legislation words to which this Part applies*) apply prevent removal of the incompatibility.>

## Our Comment

This amendment is similar to amendment 20 above and achieves the same effect for section 21.

**30.** In section 21, page 18, line 28, leave out <provision> and insert <words>

## Our Comment

See our comment above.

**31.** In section 21, page 18, line 30, at end insert—

<( ) In this section—

a “post-commencement Act of the Scottish Parliament” means an Act of the Scottish Parliament the Bill for which received Royal Assent on or after the day on which this section comes into force,

“pre-commencement Act of the Scottish Parliament” has the meaning given in section 20(9A)(a)>

## Our Comment

This amendment ensure that Acts of parliament will not be affected by incompatibility declarators because it refers only to Acts of the Scottish Parliament.

**32.** In section 21, page 18, line 31, leave out subsections (5) to (7)

## Our Comment

This amendment removes the remaining provisions of section 21 which refer to Acts of Parliament and the Bill having extra-territorial reach.

After section 23

**33.** After section 23, insert—

<Primary legislation words to which this Part applies

(c) The words to which this section applies are words that are—

(d) in an Act of the Scottish Parliament, and

(i) contained in the Bill for the Act,

(ii) contained, as part of an amending provision, in the Bill for another Act of the Scottish Parliament, or

(iii) inserted by words in subordinate legislation to which section (*Subordinate legislation words to which this Part applies*) applies.>

## Our Comment

This new clause defines the meaning of words relating to primary legislation which focus on Acts of the Scottish Parliament.

**34.** After section 23, insert—

<Subordinate legislation words to which this Part applies

(1) The words to which this section applies are words that are—

(a) in a Scottish statutory instrument originally made, wholly or partly, by virtue of a relevant enabling power, and

- (b) in the instrument as a result of—
  - (i) the exercise of a relevant enabling power (either to make the provision containing the words, or to make the amending provision that inserted them), or
  - (ii) having been inserted into the instrument by words in an Act of the Scottish Parliament to which section (*Primary legislation words to which this Part applies*) applies.

(2) In this section, “relevant enabling power” means a power conferred by a provision that is not in, or derived (directly or indirectly) from, an Act of Parliament.

(3) For the purposes of subsection (2), a provision of an Act of the Scottish Parliament is not to be regarded as derived from section 28 of the Scotland Act 1998.>

## Our Comment

This new clause defines the meaning of words relating to secondary legislation which focus on Acts of the Scottish Parliament.

### Section 24

**35.** In section 24, page 19, line 31, leave out <a provision of relevant legislation or future legislation is incompatible> and insert <words in an enactment to which section (*Primary legislation words to which this Part applies*) or (*Subordinate legislation words to which this Part applies*) applies give rise to an incompatibility>

## Our Comment

This amendment restricts the provisions of sections 26-37 to words in an Act of the Scottish Parliament- see amendment 33 which inserts a new section entitled *Primary legislation words to which this Part applies* and words in subordinate legislation see amendment 34 which inserts a new section entitled *Subordinate legislation words to which this Part applies*.

### Section 25

**36.** In section 25, page 20, line 13, leave out <a provision of relevant legislation or future legislation is incompatible> and insert <words in an enactment to which section (*Primary legislation words to which this Part applies*) or (*Subordinate legislation words to which this Part applies*) of the UNCRC Incorporation Act applies give rise to an incompatibility>

## Our Comment

See comment above

**37.** In section 25, page 20, line 16, leave out <United Nations Convention on the

Rights of the Child (Incorporation) (Scotland) Act 2021> and insert <UNCRC Incorporation Act>

## Our Comments

This is a consequential amendment required by reconsideration, "UNCRC Incorporation Act" meaning the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2023 (see amendment 41, below).

**38.** In section 25, page 20, leave out lines 19 to 21

## Our Comment

This is a consequential amendment relating to our comments on section 21 above (Section 21(5)(b)(ii) of the Bill was outside the legislative competence of the Scottish Parliament, because it would modify section 28(7) of the Scotland Act, contrary to section 29(2)(c))

**39.** In section 25, page 20, line 22, leave out <that> and insert <the UNCRC Incorporation>

## Our Comment

This is a consequential amendment required by reconsideration, "UNCRC Incorporation Act" meaning the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2023 (see amendment 41, below).

**40.** In section 25, page 20, leave out lines 23 and 24

## Our Comment

This is a consequential amendment relating to our comments for amendment 10 (section 20) and designed to avoid section 20 being subject to the same challenge as before, by limiting the scope.

**41.** In section 25, page 20, line 26, at end insert—

<"UNCRC Incorporation Act" means the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2023>

## Our Comment

We have no comments.

### Section 35

**42.** In section 35, page 26, leave out line 6

## Our Comment

This is a consequential amendment relating to our comments on section 21 above

(Section 21(5)(b)(ii) of the Bill was outside the legislative competence of the Scottish Parliament, because it would modify section 28(7) of the Scotland Act, contrary to section 29(2)(c))

**43.** In section 35, page 26, leave out line 9

## Our Comment

This is a consequential amendment relating to our comments for amendment 10 (section 20) and designed to avoid section 20 being subject to the same challenge as before, by limiting the scope.

**For further information, please contact:** Michael P Clancy Director Law Reform Law Society of Scotland