

25 September 2023

Ms Stewart MSP
Equalities, Human Rights and Civil Justice Committee
The Scottish Parliament
Edinburgh
EH99 1SP

Via Email - ehrcj.committee@parliament.scot

Dear Ms Stewart,

UNCRC Incorporation

I am writing to you following the COSLA Children and Young People Board meeting on 18 August, where Members requested that I engage with the Committee in relation to the ongoing work to incorporate the UN Convention on the Rights of the Child (UNCRC) into Scots law.

Local Government has from the outset been fully supportive of the intentions of UNCRC incorporation, sharing the vision of a Scotland where children's human rights are embedded in all aspects of society and public services. Extensive work is underway across local authorities to take forward this commitment and excellent progress has been made in a challenging landscape.

COSLA and the wider Local Government family continue to share this strong commitment to the intentions of incorporation and the meaningful protection and fulfilment of children's rights. In this context, COSLA, based on the views of our Local Government professional association partners (including SOLACE, SOLAR, Social Work Scotland and ADES), wishes to make the Committee aware of a number of issues and complexities with regards to the practical implications for councils (and likely other public authorities) of the approach to amending the UNCRC (Incorporation) (Scotland) Bill to address the judgement of the Supreme Court, as set out in the Cabinet Secretary for Social Justice's [statement](#) to Parliament on 27 June 2023 and recently published draft [amendments](#). As you will be aware, the Scottish Government's intention is to amend the legal duty to comply with UNCRC requirements so that it only applies when public authorities are delivering duties under powers in an Act of the Scottish Parliament, therefore not applying when a public authority is acting under an Act of the UK Parliament in a devolved area.

It is essential that the practical impact of limiting the scope of the Bill in this way is recognised, carefully considered, and worked through in close partnership with councils and other public authorities who will gain new duties under the legislation. Key issues that we wish to highlight include additional legal complexity; substantial gaps that will be left in the legal coverage of children's UNCRC rights; implications for practical implementation; and importantly, the additional complexity children, young people, their families and advocates will have to navigate. These issues are outlined in more detail in the remainder of this letter.

The approach being proposed would add substantial complexity to the legal position and nature of legal duty on public authorities and organisations undertaking "functions of a public nature". Local authorities exercise a wide range of powers and functions which have their basis in a complex mix of Acts of the Scottish Parliament and Acts of the UK Parliament in devolved areas. In many instances a patchwork of UK and Scottish Acts exist and operate concurrently within a single

service area. For example, under the intended approach, foundational pieces of legislation which confer councils' functions and powers in important areas (for example, the Education (Scotland) Act 1980 and Children (Scotland) Act 1995), would be outwith the scope of the Bill, whilst other aspects of educational provision and support for looked-after children which are covered within later Scottish Acts or guidance would be within the Bill's scope, leaving the legal position and nature of the statutory duty for councils complicated and very unclear. This complexity in the legal landscape will also exist across a wide range of other council and public authority functions and services.

The approach being taken will leave significant gaps in terms of legal protection of children's UNCRC rights, including in key areas where rights may be at most risk of infringement and where children and young people would expect their legal rights to apply, for example in relation to care and protection and education. This risks creating a significant gap between expectations and the practical reality, as the exclusion of key powers and functions from the scope of the legislation would mean the practical impact of the change will be significantly more limited than was originally intended and expected.

Given the anticipated legal complexity, based on early discussions with practitioners there are significant concerns about workability and practical implementation, in terms of the need for staff to interpret, implement and apply public authorities' legal duties in practice. Similarly, it is anticipated that children, young people, their families and advocates will face significant challenges in understanding children's legal rights – when they apply, and what they mean in practice, including remedies that can be sought. Clarity and accessibility for both practitioners and children and young people is crucial if the intentions of the Bill are to be achieved. It is also anticipated that this legal complexity could result in significant capacity issues for legal and other departments in local authorities, due to the time required to work through legislative issues, reducing the time and capacity available to focus on addressing rights issues and taking forward necessary improvements.

There have been calls for Scottish Government to undertake a legislative audit to inform the potential to commence a programme of re-legislating to bring excluded legislation within scope of the UNCRC duties. It is anticipated that this would be a hugely complicated and time-consuming task, meaning that this cannot be seen as a straightforward solution. From a Local Government perspective, councils are already struggling with capacity to manage the level of legislative and policy change underway and on the horizon, and further demands in this area would represent a huge undertaking in terms of the additional capacity and resource required to implement further extensive cross-sector legislative change.

In terms of actions that can be taken to help address these issues and complexities, firstly in our view it is crucial that Scottish Government undertakes an exercise to identify public authority functions that would be in scope and out of scope under the amended compatibility duty, in order to inform detailed, sector-specific guidance to support councils (and other public authorities) to understand when their legal duties will and will not apply, including in areas where particular complexity and risks are foreseen. In addition, in order to help address the risk of confusion and gap between expectations and the practical reality, very clear public messaging is required outlining the limited coverage the UNCRC legislation will have in terms of public authority functions and what this will mean in practice.

I have discussed these issues directly with the Cabinet Secretary for Social Justice and, in line with the Verity House Agreement, we hope to work jointly with Scottish Government in the coming weeks and months to continue considering these issues in partnership, working together to mitigate the risks and challenges outlined in this letter as far as possible, towards ensuring that councils and public authorities are supported and enabled to effectively embed and uphold children's rights in line with their legal obligations.

The implications for Scotland's councils – which hold important responsibilities and deliver key services for children and young people – set out in this letter are significant, and I would ask that the Committee takes time to consider these issues as part of the scrutiny work that will take place as part of the Reconsideration process for the Bill.

Local Government remains fully committed to seeing children's rights prioritised in the services we deliver and we will continue to work closely with the Scottish Government and our wider partners towards this goal.

I hope this information is useful to the Committee in their consideration of this matter.

Yours Sincerely,

Councillor Tony Buchanan
COSLA Children and Young People Board Spokesperson