

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament’s Standing Orders, these Explanatory Notes are published to accompany the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, introduced in the Scottish Parliament on 1 September 2020.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 80–FM);
 - a Policy Memorandum (SP Bill 80–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 80–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

Overview of The Bill

5. The Bill incorporates into Scots law the United Nations Convention on the Rights of the Child (“the Convention”), an international human rights treaty covering all aspects of children’s lives including civil, political, economic, social and cultural rights.

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6. The Bill provides for rights and obligations derived from the Convention, and its first 2 optional protocols, to be given effect in Scots law in the following ways:

- it places public authorities under a duty not to act incompatibly with the UNCRC requirements as defined in section 1, and provides legal remedies should they fail to do so (Part 2);
- it places public authorities under duties to publicly account for their compliance with the UNCRC requirements, in particular it places the Government under a duty to produce, and periodically report against, a scheme setting out what it is doing to comply with its duty in relation to the UNCRC requirements and places a duty on certain other public authorities to produce periodic reports on their compliance with those requirements (Part 3);
- it obliges the Government when bringing forward any new legislation to make a statement about its compatibility with the UNCRC requirements (Part 4, section 18);
- it requires that legislation (old and new) be read wherever possible in a way that is compatible with the UNCRC requirements and, where a compatible reading is not possible, it allows the courts to strike down such incompatible legislation or make a declaration of its incompatibility (Part 4, sections 19 to 21);
- it sets up procedures for the courts to address questions about the compatibility of legislation or public bodies' actions with the UNCRC requirements (Part 5);
- it enables the Government to change the law, by regulations, to cure incompatibilities (or potential incompatibilities) with the UNCRC requirements (Part 6).

7. As a Bill for an Act of the Scottish Parliament, its provisions fall to be read in accordance with the interpretation rules in [Part 1 of the Interpretation and Legislative Reform \(Scotland\) Act 2010](#).

Part 1 and the Schedule: The UNCRC Requirements

8. Part 1 deals with the interpretation of key concepts used in the subsequent Parts.

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Section 1 and the schedule: Meaning of “the UNCRC requirements” and related expressions

9. The rights and obligations that the Bill’s later Parts deal with are labelled as “the UNCRC requirements” by section 1. They are derived from the Convention and the 2 optional protocols ratified by the United Kingdom. The text of those parts of the Convention and its optional protocols that are comprehended by the label “the UNCRC requirements” is set out in the schedule (the content of which may be changed in future by regulations under section 3).

10. In public international law, the Convention and its optional protocols have effect in relation to the United Kingdom subject to any reservations, objections or interpretative declarations made by the United Kingdom. Section 1(3) provides that, for the Bill’s purposes, the UNCRC requirements are to have effect subject to the same reservations, objections and interpretative declarations as apply, in public international law, to the treaty obligations of the United Kingdom from which the requirements are derived.

Section 2: Meaning of references to States Parties and related expressions in the UNCRC requirements

11. The UNCRC requirements refer throughout to States Parties. The purpose of section 2 is to allow such references to be read generally as including references to public authorities under the Bill. There are also certain places in the UNCRC requirements where a reference to States Parties, to a State Party or to a related expression like “jurisdiction” or “territory” needs to be read as something different to make sense in the domestic context, so the table in subsection (3) provides for those references to be read with modifications to achieve that effect.

12. In relation to article 2 of the Convention as set out in the UNCRC requirements, the table also contains a modification so that the reference in that article to States Parties is read as a reference to a more restricted class of public authority, for reasons of legislative competence.

Section 3: Power to modify the schedule

13. Section 3 gives the Government the power, by regulations, to modify the terms of the schedule, which sets out the text of those parts of the Convention and its optional protocols that are comprehended by the label

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“the UNCRC requirements”. By changing the terms of the schedule, the Government can therefore change what is required of those public authorities that the later Parts of the Bill oblige not to act incompatibly with the UNCRC requirements.

14. The Government’s regulation-making power to change what constitutes the UNCRC requirements is subject to limitations. Provisions from the Convention and its first and second optional protocols that are already in the schedule cannot be removed. In relation to those sources, regulations can only add provisions not already included or make adjustments to reflect amendments to the treaties on which they are based.

15. The power to make changes to reflect amendments to the treaties can only be used to reflect amendments that are binding on, and in force in relation to, the United Kingdom as a matter of international law. Regulations modifying the schedule to reflect a treaty amendment can be made in advance of that amendment coming into force in relation to the United Kingdom, provided that the modification provided for in the regulations does not take effect before the treaty amendment enters into force.

16. The Government can also exercise its power to change what constitutes the UNCRC requirements to take account of optional protocols to the Convention other than the first and second (which are already covered by the schedule). The power to do so is restricted so that the schedule can only be modified to take account of protocols that have been ratified by the United Kingdom and the modifications cannot take effect until the protocol in question has entered into force in relation to the United Kingdom.

17. Sections 1, 4 and 12 refer only to the Convention and its first and second optional protocols. If, for example, the schedule were to be modified by regulations to incorporate obligations arising from the third optional protocol, sections 1, 4 and 12 would need to be adjusted too in order to refer to that protocol. Section 3(5) enables the Government to make such changes to sections 1, 4 and 12 by regulations. The Government might also wish to include a definition in section 35 so that may be amended too.

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18. Regulations under section 3 are subject to parliamentary scrutiny by way of the affirmative procedure, which is set out in [section 29 of the Interpretation and Legislative Reform \(Scotland\) Act 2010](#). It means that the regulations cannot be made unless the Scottish Parliament approves a draft of them.

Section 4: Interpretation of the UNCRC requirements

19. As explained in paragraph 9, the schedule sets out the text of those parts of the treaties from which the UNCRC requirements are derived. This means that the schedule does not include the full text of those treaties or their preambles. As a matter of public international law, the text of any part of a treaty has to be interpreted against the backdrop of the treaty's full text and preamble. Since some treaty text, or preamble text, not included in the schedule may have a bearing on the interpretation of text that is included in the schedule, section 4 confirms that a court or tribunal that is determining a question about the UNCRC requirements may take into account any text of the treaty that is not currently set out in the schedule, as well as the treaty's preamble, so far as it is relevant to the interpretation of the UNCRC requirements in a case.

Section 5: Duty to modify section 4 on ratification of the third optional protocol **Section 6: Acts of public authorities to be compatible with the UNCRC requirements**

20. Section 5 requires the Government to modify section 4 by regulations in the event that the United Kingdom ratifies the third optional protocol to the Convention. This might be used for example to add reference to any parts of the third optional protocol or the protocol's preamble to the material that can be used for interpretative purposes.

Part 2: Duties on public authorities

21. Part 2 establishes the duty of public authorities not to act incompatibly with the UNCRC requirements, as defined in section 1, and makes provision about the consequences of any failure to do so.

Section 6: Acts of public authorities to be compatible with the UNCRC requirements

22. Section 6 makes it unlawful for a public authority to act, or to fail to act, in a way that is incompatible with the UNCRC requirements.

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23. The phrase “public authority” is not exhaustively defined by the section and so is to be given its ordinary meaning. The courts have considered in a number of cases the meaning of the phrase “public authority” in the analogous [section 6 of the Human Rights Act 1998](#).

24. The phrase “public authority”, when used in a provision of an Act of the Scottish Parliament, cannot be read as extending to an authority if it would be outside the Parliament’s legislative competence for the provision to extend to that authority (see the interpretation rule in [section 101 of the Scotland Act 1998](#)). The limits of the Parliament’s legislative competence are set by [section 29 of the Scotland Act 1998](#). In relation to both which bodies are captured and how those bodies exercise their functions, the duty applies only to the extent permissible within the limits of the Scottish Parliament’s legislative competence. The Bill makes specific provision in relation to the Scottish Parliament, which is specifically excluded from the definition of “public authority” and therefore the compatibility duty. Persons carrying out functions in connection with proceedings in the Scottish Parliament are also excluded from the definition.

Section 7: Proceedings for unlawful acts

25. Section 7 confers the following rights on any person (as defined in [schedule 1 of the Interpretation and Legislative Reform \(Scotland\) Act 2010](#)):

- the right to bring proceedings against a public authority in a civil court or tribunal for acting, or proposing to act, in a way that section 6 makes it unlawful for the authority to act (which is to say, incompatibly with the UNCRC requirements);
- the right to invoke the UNCRC requirements against a public authority in proceedings before a court or tribunal (for example by highlighting the incompatibility of the authority’s actions with the UNCRC requirements, and hence their unlawfulness, by way of a defence in proceedings brought by the authority against the individual).

26. Subsections (5) and (6) provide a power for the Scottish Ministers to add to the powers of a tribunal if they think it necessary to do so to ensure that the tribunal can provide an appropriate remedy. Regulations under subsection (5) are subject to parliamentary scrutiny by way of the affirmative procedure.

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27. The right to bring proceedings against a public authority under section 7(1)(a) is subject to the following restrictions:

- proceedings cannot be brought in relation to any alleged incompatible act that took place before the day that section 7 comes into force (which day is to be appointed by regulations under section 40) although the UNCRC requirements may be relied upon by a person in proceedings brought by a public authority whenever the act took place;
- section 9 restricts how proceedings may be brought in respect of judicial acts (see paragraphs 37 to 41);
- proceedings cannot be brought after the applicable deadline (subject to the discretion that the court or tribunal in question may have to allow proceedings to be brought after the deadline).

28. The applicable deadline for bringing proceedings against a public authority under section 7(1)(a) will depend on the procedure by which the proceedings are brought. If that procedure requires that proceedings be brought in a period shorter than 1 year, then the time limit that ordinarily applies to proceedings brought under that procedure will operate. For example, judicial review proceedings are generally subject to a 3-month time limit, therefore proceedings under section 7(1)(a) brought by way of judicial review would have to be brought within 3 months of the act complained of (unless the court exercised its discretion to allow the proceedings to be brought outwith that period).

29. The clock does not start ticking on the 1 year period until the individual by whom, or on whose behalf, the proceedings are brought turns 18. A court or tribunal can allow proceedings to be brought before after the 1 year period has expired if satisfied that it is equitable to do so in the circumstances.

30. Subsection (11) of section 7 deals with the time limit for bringing proceedings under section 7(1)(a) to the supervisory jurisdiction of the Court of Session. Applications to the Court's supervisory jurisdiction are usually known as judicial review. Subsection (11) amends [section 27A of the Court of Session Act 1988](#) so that the same rule that subsection (9) applies to the calculation of the 1 year time limit under subsection (7) applies to the calculation of the 3 month time limit that section 27A of the 1988 Act sets for applications to the Court's supervisory jurisdiction. In

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other words, the clock does not start ticking on that 3-month period until the individual by whom, or on whose behalf, the application to the Court is to be made turns 18. This is subject to section 27A(2) of the 1988 Act, so that where an enactment sets a deadline for bringing judicial review proceedings that is shorter than 3 months, this extension of time will not apply.

Section 8: Judicial remedies

31. Section 8 deals with the remedies that a court or tribunal can grant on finding that a public authority has acted, or was proposing to act, incompatibly with the UNCRC requirements and so unlawfully under section 6(1).

32. Subsection (1) confirms that the court or tribunal can grant any relief or remedy, or make any order, that it is within its powers to grant or make. The rest of the section is concerned with damages as a remedy (see also section 9(3) on the subject of damages).

33. Subsection (2) sets out that nothing in the Bill empowers a court or tribunal to award damages if that court or tribunal does not otherwise have the power to do so.

34. Traditionally damages for wrongs are awarded in Scotland on the basis of trying to put the wronged person back into the position that the person would have been in had the wrong not occurred. Subsection (3) places a duty on courts and tribunals considering whether to award damages for a failure to act compatibly with the UNCRC requirements, and how much to award, to consider those questions on the basis of what is necessary to provide just satisfaction to the person. This is the principle on the basis of which damages are awarded under [section 8 of the Human Rights Act 1998](#).

35. Subsection (4) applies section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 to any award of damages under this section. Equivalent provision is contained in [section 8\(5\)\(a\) of the Human Rights Act 1998](#).

36. Subsection (5) precludes an award of damages from being made to the Commissioner for Children and Young People in Scotland.

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Section 9: Restriction on proceedings in respect of judicial acts

37. As courts and tribunals are public authorities for the purposes of section 6, like other public authorities they act unlawfully if they act in a way that is incompatible with the UNCRC requirements. Thus if a court or tribunal makes a decision that is incompatible with the UNCRC requirements during, or at the conclusion of, a case before it, that judicial act may itself be challenged in further proceedings before a court or tribunal under section 7(1)(a).

38. There are established processes for challenging the judicial acts of courts and tribunals, and section 9(1) and (2) require that they be used. For example, it would not be appropriate for a sentencing decision taken at the conclusion of a criminal trial by the High Court of Justiciary, Scotland's supreme criminal court, to be challenged by way of a civil action for damages in the sheriff court, which is lower in the judicial hierarchy. Any complaint that the High Court made an error while sitting as a trial court, including an error by acting incompatibly with the UNCRC requirements, should properly be dealt with by way of an appeal to the High Court.

39. Section 9(1) mentions the possibility of challenging a judicial act through any right of appeal or by application to the supervisory jurisdiction of the Court of Session. Subsection (2) makes clear that subsection (1) is not to be read as allowing an application to the Court's supervisory jurisdiction that would otherwise be impermissible. For example, it is not to be taken to allow an application to be made to the Court of Session, Scotland's supreme civil court, contesting a decision taken in an appeal in a criminal case by the High Court.

40. Paragraph (c) of section 9(1) allows for the possibility of court rules providing a new process to challenge a judicial act that is alleged to be incompatible with the UNCRC requirements should a need be identified to have a process for that besides the ordinary processes referred to in paragraphs (a) and (b). Section 37 makes further provision about court rules.

41. Section 9(3) prevents damages from being awarded against a court or tribunal if the impugned judicial act was done in good faith (on the subject of damages generally, see section 8).

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Section 10: Power for Commissioner to bring or intervene in proceedings

42. The Commissioner for Children and Young People in Scotland is an office established by the Commissioner for Children and Young People (Scotland) Act 2003. Being a statutory office, the Commissioner can only do those things that statute empowers the Commissioner to do. Section 10 of the Bill amends [section 4 of the 2003 Act](#) so that amongst the things that the Commissioner is empowered to do are:

- bringing proceedings in a court or tribunal on the grounds that a public authority has acted, or proposes to act, incompatibly with the UNCRC requirements;
- intervening in court or tribunal proceedings in which someone else is levelling that charge against a public authority.

Part 3: Children’s Rights Scheme, Child Rights and Wellbeing Impact Assessments and Reporting Duties

43. Part 3 contains a range of provisions aimed at promoting transparency in relation to compliance with the duty under section 6.

Sections 11 and 12: Children’s Rights Scheme

44. Section 11 requires the Scottish Ministers to make a scheme, to be known as the Children’s Rights Scheme¹, which sets out the arrangements that the Scottish Ministers have made, or propose to make, in order to ensure that they comply with their obligations under section 6 of the Bill.

45. The arrangements that may be set out in the Scheme are wide ranging and may deal with both strategic and practical matters. Subsection (3) provides some examples of the type of material that the Scheme may include and the outcomes that are to be achieved, but this is not a closed list. It is worth noting that section 14(4) requires the Scottish Ministers to include in the Scheme a statement about the circumstances in which a child rights and wellbeing impact assessment must be prepared.

46. Once up and running, the Scheme is to be reviewed on an annual basis with a report on the operation of the Scheme being published following each review (section 13, see paragraph 53). However, the first Scheme will specify the date by which the first report is due in order to

¹ Referred to in the Bill and these notes as “the Scheme”.

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enable the annual cycle to be set up at an appropriate date. The first Scheme may also contain any specific actions that the Scottish Ministers are to take in respect of matters relating to the Scheme in respect of the period from the first Scheme being made until the first report on its operation is published. This will differ from the core content of the Scheme which will tend to cover ongoing processes or frameworks as opposed to specific actions that are to be taken in the coming year. For example, the Scheme may set out the procedure to be followed when preparing a child rights and wellbeing impact assessment, while the actions may indicate that the Scottish Ministers intend to carry out such an assessment in relation to a particular piece of legislation or strategic decision.

47. Section 12 sets out the procedure that the Scottish Ministers must follow to prepare and make the Scheme and, once it has been made, to amend or replace it. For the purposes of the section, the draft scheme, the proposed amendment or draft replacement scheme is referred to as “the proposal”. Subsection (8) enables the Scottish Ministers to begin the process of preparing and consulting on a proposal for the Scheme before the section comes into force.

48. The procedure may be summarised as comprising the following steps.

Step 1 - Preparation

49. The Scottish Ministers must prepare the proposal having regard to the documents listed in subsection (2). They may also have regard to any other document or matter they consider relevant. This will result in a draft of the proposal for publication and consultation.

Step 2 – Publication and consultation

50. Once the proposal has been prepared, the Scottish Ministers must publish it and consult the people listed in subsection (3). Following that consultation, subsection (4) confirms that they may make changes to the proposal if they consider it appropriate. This confirms that the proposal may be refined in light of the consultation responses.

Step 3 – Laying before Parliament and making

51. Once at least 28 days have passed since the proposal was published under subsection (3), the Scottish Ministers may lay the proposal before

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the Scottish Parliament, at which point it is likely to be debated by the Parliament. It is only once the proposal has been laid that the Scottish Ministers may make the Scheme.

52. Once the Scheme has been made (or amended or replaced), the Scottish Ministers must publish it in such manner as they consider appropriate.

Section 13: Reviewing and reporting on the operation of the Scheme

53. Section 13 provides that the Scottish Ministers must review and report on the operation of the Scheme on an annual basis.

54. Each report is required to summarise the actions that the Scottish Ministers have taken to ensure that they have complied with the duty under section 6(1) (whether or not that action is done under arrangements set out in the Scheme). The report must also include a statement as to whether the Scottish Ministers will be amending or replacing the Scheme and any other specific actions that they might be taking in the coming year. The report may also include other matters that relate to the rights or wellbeing of children. For example, this may include action that the Scottish Ministers are taking in respect of any aspect of the UNCRC which has not been incorporated under the Bill, so far as that action can be taken within devolved competence.

55. Where any of the events listed in subsection (2) have occurred, these must be taken into account during the review as these are significant events that are likely to require either changes to be made to the Scheme or specific actions to be taken in the coming year.

56. In deciding what actions for the coming year are to be included in the report, the Scottish Ministers must consult the people listed in subsection (5), that is: children, the Commissioner for Children and Young People and anyone else that the Scottish Ministers consider appropriate. This latter element will allow for a wide range of civil society to contribute to the discussion.

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57. Reports under the section are to be published and laid before the Scottish Parliament. The Scottish Ministers must also prepare and publish a version of the report that they consider will be understood by children.

Section 14: Child rights and wellbeing impact assessments

58. Section 14 requires the Scottish Ministers to carry out a child rights and wellbeing impact assessment in respect of provisions of primary and secondary legislation and certain decisions of a strategic nature that relate to the rights and wellbeing of children. The purpose of such an impact assessment is to consider the likely effects of the provision or decision on children's rights and wellbeing and so inform the process of making the legislation or the decision. The Scottish Government has been preparing such impact assessments on a non-legislative basis since June 2015.

59. In relation to secondary legislation, the duty imposed by this section covers subordinate legislation under both UK and Scottish statutes, so long as it is a Scottish statutory instrument made by the Scottish Ministers (other than commencement orders or regulations). Acts of Sederunt and other court rules, statutory codes of practice, directions and guidance are not included here.

60. The requirement of the Scottish Ministers to carry out an impact assessment in respect of such decisions of a strategic nature as they consider appropriate (subsection (3)) is intended to capture major policy decisions taken in relation to children's rights and wellbeing. While the Scottish Ministers have some discretion as to when they are to carry out such an impact assessment, subsection (4) requires them to include in the Scheme a statement setting out the circumstances in which they consider it will be appropriate.

61. Subsection (5) provides that child rights and wellbeing impact assessments must be published and gives the Scottish Ministers power to decide how this is achieved. However, there may also be situations, particularly in relation to policy decisions, where the assessment is reviewed and updated as matters develop. For example, if an assessment identifies an adverse impact and, as a consequence, steps are taken to reduce that impact, the assessment may be reviewed and updated accordingly. In those circumstances the assessment may be published again.

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Section 15: Reporting duty of listed authorities

62. Section 15 of the Bill replaces the duty in section 2 of the Children and Young People (Scotland) Act 2014 (“the 2014 Act”). It requires the authorities which are listed in section 16 of the Bill to prepare and publish reports on what they have done to comply with the duty in section 6(1) of the Bill. These reports are required on a three yearly basis (as they were under the 2014 Act).

63. The authorities listed in section 16 are the same as those which are listed in schedule 1 of the 2014 Act. The Scottish Ministers may amend this list by regulations (which are subject to the affirmative procedure). Only bodies which are public authorities may be added to the list (for the meaning of public authority, see paragraph 23 above and sections 6(3), (4) and 35 of the Bill).

64. The Scottish Ministers must consult a public authority (or where appropriate, public authorities meeting a particular description) before the authority is (or authorities are) added to, or removed from, the list.

Section 17: Consequential amendments of the Children and Young People (Scotland) Act 2014

65. Section 17 repeals Part 1 and schedule 1 of the 2014 Act. Section 1 of the 2014 Act has been replaced by the reporting duties included in section 13 of the Bill and section 2 (and schedule 1) of the 2014 Act has been replaced by sections 15 and 16 of the Bill.

Part 4: Legislation and the UNCRC requirements

66. Part 4 deals with legislation’s compatibility with the UNCRC requirements, as defined by section 1. In particular, the Part:

- places the Government under a duty when putting new legislation, or proposed legislation, before the Scottish Parliament to make a statement about its compatibility with the UNCRC requirements;
- provides that certain legislation (old as well as new) is to be interpreted in a way that is consistent with the UNCRC requirements where possible;
- allows a court which finds that a piece of legislation cannot be interpreted consistently with the UNCRC requirements to either

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strike it down or declare it to be incompatible with the UNCRC requirements.

Section 18: Statements of compatibility in relation to legislation

67. Subsection (1) of section 18 requires that all Government Bills introduced to the Scottish Parliament be accompanied by a statement from the member introducing the Bill about its compatibility with the UNCRC requirements.

68. Subsection (2) creates an equivalent rule where the Government makes a Scottish statutory instrument other than one bringing primary legislation into force. The phrase “Scottish statutory instrument” is defined by [section 27 of the Interpretation and Legislative Reform \(Scotland\) Act 2010](#).

Section 19: Interpretation of legislation

69. Section 19(1) requires that certain types of legislation must, if possible, be given an interpretation that is compatible with the UNCRC requirements. This interpretative obligation is analogous to the obligation created by [section 3 of the Human Rights Act 1998](#), the effect of which has been the subject of judicial consideration in a number of cases (see for example [Ghaidan v Godin-Mendoza \[2004\] UKHL 30](#)).

70. The interpretative obligation under subsection (1) applies to the following types of legislation whenever made:

- Acts of the Scottish Parliament,
- Acts of the UK Parliament,
- legislation wholly or partly made by virtue of an Act of the Scottish Parliament or of the UK Parliament.

71. But the interpretative obligation does not apply to legislation that it is not within the legislative competence of the Scottish Parliament to make. The limits of the Parliament’s legislative competence are set by [section 29 of the Scotland Act 1998](#). A provision may be contained within part of an Act of Parliament that extends to Scotland and another UK jurisdiction. Section 19(3) makes clear that that fact alone does not mean that the provision is to be regarded as outside the legislative competence of the

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Scottish Parliament for the purpose of ascertaining the legislation that is covered by section 19(2).

72. Subsection (4) states that the interpretative obligation under subsection (1) does not affect the operability of any primary legislation or allow an interpretation to result in the inoperability of subordinate legislation if the primary legislation under which it is made prevents removal of the incompatibility.

73. If a court finds it impossible to read a piece of legislation in a way that is compatible with the UNCRC requirements, it can (depending on the type of legislation in question) make a strike down declarator under section 20 or an incompatibility declarator under section 21.

Section 20: Strike down declarators

74. Section 20 allows a court to strike down certain kinds of legislation (see paragraphs 80 to 82) if it finds that legislation to be incompatible with the UNCRC requirements, which necessarily means that the court was unable to find a way to interpret the legislation compatibly with those requirements in accordance with section 19.

Effect of striking down legislation

75. The effect of striking down legislation under section 20 is as follows:

- From the point at which it is struck down, the legislation no longer forms part of Scots law. It is not, however, to be treated as never having formed part of Scots law and so anything lawfully done under the legislation before it was struck down is not rendered unlawful retrospectively.
- The Government's duty to make a statement to the Scottish Parliament under section 23 is triggered.

Suspension of effect of strike down

76. A court may, if it considers it appropriate to do so when making a strike down declarator, delay its taking effect so that, for example, the legislation can remain in force while steps are taken to remedy its incompatibility with the UNCRC requirements (subsection (5)). Steps to remedy an incompatibility may, for example, involve the Government

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amending the legislation in question through remedial regulations under section 32.

77. As there may be a call for the Government to take remedial action ahead of legislation being struck down, and to ensure that before deciding to strike legislation down the court is appraised of the wider public interest ramifications, subsections (7) and (8) require that where a court is considering suspending the effect of a strike down declarator the Lord Advocate, who is the Government's senior law officer, be informed and given an opportunity to make representations to the court. If the Lord Advocate's involvement results in the litigation becoming more expensive than it would otherwise have been, section 31 allows the court to award expenses to the party who incurred them (whatever the outcome).

Courts that can strike legislation down

78. The power to make a strike down declarator is exercisable by:

- the Supreme Court of the United Kingdom,
- the Court of Session, which is Scotland's supreme civil court,
- the High Court of Justiciary, which is Scotland's supreme criminal court, but the High Court can only exercise the strike down power when it is not sitting as a trial court (which means it can do so when, for example, acting as an appeal court).

Procedure to be followed before striking down

79. Before making a strike down declarator the court must afford the Lord Advocate and the Commissioner for Children and Young People in Scotland an opportunity to make representations (see section 22).

Legislation that is susceptible to strike down

80. Legislation is only susceptible to being struck down under section 20 if it is legislation that it would be within the legislative competence of the Scottish Parliament to make. The limits of the Parliament's legislative competence are set by [section 29 of the Scotland Act 1998](#). A provision may be contained within part of an Act of Parliament that extends to Scotland and another UK jurisdiction. Section 20(11) makes clear that that fact alone does not mean that the provision is to be regarded as outside the legislative competence of the Scottish Parliament for the purpose of ascertaining the legislation that is covered by section 20(10).

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81. Primary legislation can only be struck down if enacted before the day that section 20 comes into force. The date on which section 20 is to come into force is to be set by the Government in regulations (see section 40). If a court finds primary legislation enacted on or after that date to be incompatible with the UNCRC requirements, it can make an incompatibility declarator under section 21. For this paragraph's purposes, primary legislation means: an Act of the Scottish Parliament or an Act of the UK Parliament.

82. Whereas primary legislation can only be struck down if enacted before section 20 comes into force, subordinate legislation is susceptible to being struck down whenever it is made. Subordinate legislation, in this context, means legislation made wholly or partly by virtue of primary legislation as defined in paragraph 81 that was enacted before the day that section 20 comes into force. For example, regulations made by the Government in exercise of regulation-making powers in an Act of the Scottish Parliament enacted before section 20 comes into force could be struck down under section 20 despite the regulations themselves being made on or after the day section 20 came into force.

83. The preceding paragraphs refer to legislation being struck down. Section 20 uses the more precise word "enactment", the meaning of which is given by [schedule 1 of the Interpretation and Legislative Reform \(Scotland\) Act 2010](#).

Section 21: Incompatibility declarators

84. Section 21 allows a court to declare certain legislation (see paragraph 88) to be incompatible with the UNCRC requirements, where it has found it impossible to interpret the legislation compatibly with those requirements in accordance with section 19.

85. An incompatibility declarator triggers the Government's duty to make a statement to the Scottish Parliament under section 23. Legislation declared to be incompatible with the UNCRC requirements under this section remains the law unless and until legislative action is taken in relation to it.

86. The power to make an incompatibility declarator is exercisable by the same courts that can make a strike down declarator (see section 20(13) and paragraph 78).

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87. Before making an incompatibility declarator the court must afford the Lord Advocate and the Commissioner for Children and Young People in Scotland an opportunity to make representations (see section 22).

88. The legislation in respect of which 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. In other words, an incompatibility declarator can be made in respect of:

- a provision of an Act of the Scottish Parliament or an Act of the UK Parliament or legislation made by virtue of an Act of the Scottish Parliament or an Act of Parliament;
- provided that the legislation is enacted on or after the day section 21 came into force (the date for which is to be set by regulations under section 40);
- provided also that the legislation is within the legislative competence of the Scottish Parliament (see [section 29 of the Scotland Act 1998](#)). A provision may be contained within part of an Act of Parliament that extends to Scotland and another UK jurisdiction. Section 21(6) makes clear that that fact alone does not mean that the provision is to be regarded as outside the legislative competence of the Scottish Parliament for the purpose of ascertaining the legislation that is covered by section 21(5)(a).

Section 22: Power to intervene in proceedings where strike down declarator or incompatibility declarator is being considered

89. Section 22 requires a court considering making a strike down declarator or an incompatibility declarator to afford the following persons an opportunity to make representations to it:

- the Lord Advocate, who is the Government's senior law officer,
- the Commissioner for Children and Young People in Scotland, who is the holder of an office established by [the Commissioner for Children and Young People \(Scotland\) Act 2003](#).

90. If the involvement of either or both of those persons results in the litigation becoming more expensive than it would otherwise have been,

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section 31 allows the court to award those expenses to the party who incurred them (whatever the outcome).

Section 23: Ministerial action following strike down declarator or incompatibility declarator

91. Section 23 sets out what the Government must do in the event that a strike down declarator (under section 20) or an incompatibility declarator (under section 21) is made in relation to a piece of legislation.

92. It requires the Government, within 6 months of the declarator being made, to:

- report publicly on what (if anything) it intends to do in response to the declarator;
- seek to make a statement to the Scottish Parliament on the matter (the Government can only seek to make a statement within the 6-month period because the scheduling of business in the Parliament is not controlled by the Government).

Part 5: Compatibility questions and UNCRC compatibility issues

93. Part 5 makes provision for a system for the courts to consider compatibility questions (in civil proceedings) and UNCRC compatibility issues (in criminal proceedings) relating to the compatibility of legislation with the UNCRC requirements and public authorities' compliance with section 6.

Section 24: Meaning of “compatibility questions”

94. Section 24 provides the definition of “compatibility question” for this Part. These are questions arising in civil proceedings as to whether a provision of relevant legislation (see section 20) or future legislation (see section 21) is compatible with the UNCRC requirements or whether a public authority has acted in a way which section 6 makes unlawful.

95. Subsection (2) excludes from the meaning of “compatibility questions” things that would otherwise meet the definition but which occur in criminal proceedings. Those are dealt with as UNCRC compatibility issues and covered by section 25 instead.

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96. Subsection (3) sets out that a compatibility question is not to be taken to have arisen in proceedings just because a party claims one has if the court or tribunal thinks the party's contention is frivolous or vexatious.

Section 25: UNCRC compatibility issues in criminal proceedings

97. Section 25 provides the definition of "UNCRC compatibility issues" for this Part. These are questions arising in criminal proceedings as to whether a provision of relevant legislation (see section 20) or future legislation (see section 21) is compatible with the UNCRC requirements or whether a public authority has acted in a way which section 6 makes unlawful.

98. This section adds sections 288AB and 288AC to the Criminal Procedure (Scotland) Act 1995 to establish a system to allow lower criminal courts to refer UNCRC compatibility questions to the High Court and for the High Court to refer such questions to the Supreme Court. Where an issue is referred to the Supreme Court, the Supreme Court may only deal with the UNCRC compatibility issue and must remit the rest of the proceedings to the High Court. These sections allow the Lord Advocate to require a criminal court to refer an issue to a higher court.

Section 26: Power to institute proceedings to determine compatibility questions

99. Section 26 allows the Lord Advocate to start new proceedings to determine a compatibility question.

Section 27: Power to intervene in proceedings where compatibility question arises

100. Where a compatibility question arises in a case, the court must notify the Lord Advocate and the Commissioner for Children and Young People in Scotland (unless they are already a party to the case). They can then take part in the proceedings as if they were a party to the case.

101. If the involvement of either or both of those persons results in the litigation becoming more expensive than it would otherwise have been, section 31 allows the court to award those expenses to the party who incurred them (whatever the outcome).

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Section 28: Reference of compatibility question to higher court

102. Section 28 makes provision in the civil courts similar to that added to the Criminal Procedure (Scotland) Act 1995 by section 25.

103. A court other than the Inner House of the Court of Session or the Supreme Court may refer a compatibility question which arises in a case before it to the Inner House. In the case of a tribunal from which there is no appeal, such a reference is mandatory.

104. The Inner House may refer such a question (other than one referred to it) to the Supreme Court.

105. An appeal from the Inner House's decision on such a reference is to the Supreme Court. Where there would not normally be an appeal to the Supreme Court from a determination of a compatibility question by the Inner House, such an appeal is possible with the permission of the Inner House or, if it refuses permission, the Supreme Court itself.

Section 29: Direct references to the Supreme Court: compatibility question arising in proceedings

106. Where a compatibility question arises in proceedings, section 29 allows the Lord Advocate to require the court or tribunal to refer the question directly to the Supreme Court.

Section 30: Direct references to the Supreme Court: compatibility issues not arising in proceedings

107. Section 30 allows the Lord Advocate to refer a compatibility question to the Supreme Court even if it does not arise in proceedings. Where such a question relates to the proposed exercise of a function by a public authority, the Lord Advocate must notify the public authority in question. That authority may not then exercise the function until the reference to the Supreme Court has concluded.

Section 31: Additional expenses

108. Where a court or tribunal considers that a party to proceedings has incurred additional expense as a result of an intervention by the Lord Advocate or the Commissioner for Children and Young People in Scotland under section 20(8), 22(2) or 27(2), the court or tribunal may award the

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whole or part of those expenses to the party who incurred them (whatever the decision on the compatibility question).

Part 6: Remedial regulations

109. Part 6 empowers the Government to change the law, by regulations, in order to cure an incompatibility (or potential incompatibility) with the UNCRC requirements as defined by section 1. It sets out two processes for making such regulations, one that is normally to be followed and an alternative process where there is a need to act more quickly than the normal process would allow.

Section 32: Remedial regulations

110. Section 32 confers power on the Government to make remedial regulations. The power can be used for the following purposes, on condition that the Government is satisfied that there are compelling reasons for making remedial regulations as distinct from taking any other course of action:

- to address an incompatibility (or potential incompatibility) between, on the one hand, the UNCRC requirements and, on the other, an Act of the Scottish Parliament, an Act of the UK Parliament or subordinate legislation made under either kind of Act;
- to address an incompatibility (or potential incompatibility) arising from anything done by a member of the Scottish Government (members of the Scottish Government are identified in [section 44\(1\) of the Scotland Act 1998](#)).

111. Criminal offences can be created by remedial regulations. Subsection (4) provides that a fine imposed on a person convicted under summary procedure of an offence created by remedial regulations cannot exceed level 5 on the standard scale. The standard scale is set in [section 225 of the Criminal Procedure \(Scotland\) Act 1995](#). At the time of the Bill's introduction, a level 5 fine is £5,000.

Section 33: Remedial regulations: procedure

112. Section 33 sets out the normal process for making remedial regulations under section 32. An alternative process is set out by section 34 for urgent situations.

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113. Section 33 provides that remedial regulations are normally subject to parliamentary scrutiny by way of the affirmative procedure, which is set out in [section 29 of the Interpretation and Legislative Reform \(Scotland\) Act 2010](#). It means that the regulations cannot be made unless the Scottish Parliament approves a draft of them.

114. Section 33 provides for additional procedural requirements, beyond those of the affirmative procedure, to apply to remedial regulations. Subsection (2) requires the Government to carry out a consultation process before it lays draft remedial regulations before the Parliament to seek its approval under the affirmative procedure. The Government is to invite the public to make comments on the draft remedial regulations within a 60-day comment period. A day is not to be counted if the Parliament is dissolved (which it is to say the day falls during the election period between one session of the Parliament ending and the new one beginning following the election). Nor is a day to be counted if it is a day within a period of 4 or more days during which the Parliament is in recess (details of when the Parliament is in recess can be found on its website, its recesses typically coincide with school holidays in Scotland).

115. Only once it has carried out the consultation required by subsection (2) may the Government seek the Parliament's approval of draft remedial regulations under the affirmative procedure. Subsection (4) requires that, when it does so, the Government must lay before the Parliament alongside the draft regulations a document summarising the comments received during the consultation period and, if the draft regulations being laid before the Parliament differ from the draft of the regulations consulted on, a statement of how they differ and why.

Section 34: Urgent remedial regulations

116. Whereas section 33 sets out the normal process for making remedial regulations under section 32, section 34 sets out a special process for urgent cases. Under the section 34 process, remedial regulations can be made and come into force immediately but will cease to have effect if the Scottish Parliament has not approved them by resolution within a certain period of their being made. The section 34 process also requires consultation on the regulations and allows for the possibility of their being changed, or replaced, within that period.

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117. The period within which remedial regulations must be approved by resolution of the Parliament if they are to remain in force is 120 days (subsection (8)), but subsection (10) creates a special rule about how those 120 days are to be counted. A day is not to be counted if the Parliament is dissolved (which it is to say the day falls during the election period between one session of the Parliament ending and the new one beginning following the election). Nor is a day to be counted if it is a day within a period of 4 or more days during which the Parliament is in recess (details of when the Parliament is in recess can be found on its website, its recesses typically coincide with school holidays in Scotland).

118. Immediately after making remedial regulations following the section 34 process, the Government must give notice of them to the public and the Scottish Parliament (subsection (2)). In giving notice of the regulations to the public, the Government must invite comment on them within a 60 day period (but those 60 days are to be counted in the manner described in the preceding paragraph in relation to the 120 day period).

Part 7: Final Provisions

Section 35: Interpretation

119. Section 35 defines certain words and expressions used in the Bill.

Section 36: No modification of the Human Rights Act 1998

120. Section 36 states that nothing in the Bill modifies the Human Rights Act 1998.

Section 37: Rules of court

121. Section 37 makes provision about rules of court. It provides first of all that any existing power to make rules of court can be used to make provision for the purposes of the Bill. It also provides that where the Bill requires the giving of intimation or notice that is to be done as rules of court require.

Section 38: Regulations

122. Where a provision in the Bill enables the Scottish Ministers to make regulations, section 38 sets out that this includes the power to make incidental, supplementary, consequential, transitional or saving provision, and different provision for different purposes. However this does not apply

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to commencement regulations under section 40, where provision is made in section 40(4) instead.

Section 39: Ancillary provision

123. Section 39 enables the Government to make ancillary provision, by regulations, to give full effect to the Bill or any provision made under it. It includes the power to modify other enactments (including the Act itself).

124. Regulations under section 39 that amend the text of an Act are subject to parliamentary scrutiny under the affirmative procedure (as defined by [section 29 of the Interpretation and Legislative Reform \(Scotland\) Act 2010](#)). Otherwise, they are subject to the negative procedure (as defined by [section 28 of that Act](#)).

Section 40: Commencement

125. Section 40 deals with when the Bill's provisions come into effect as a matter of law.

126. Sections 35, 38, 39, 40 and 41 will come into effect automatically the day after the day that the Bill for the Act receives Royal Assent. The process by which a Bill becomes an Act of the Scottish Parliament is set out in [section 28 of the Scotland Act 1998](#).

127. The rest of the Bill's provisions will take effect on the day, or days, appointed by the Government in regulations. Section 40(4) allows different coming into force days to be appointed for different purposes and for the commencement regulations to make transitional, transitory or saving provision. Regulations appointing the day that some or all of the Bill's provisions take effect will be laid before the Scottish Parliament in accordance with [section 30 of the Interpretation and Legislative Reform \(Scotland\) Act 2010](#).

128. Section 40(3) allows commencement regulations to amend provisions of the Act resulting from the Bill so that anyone reading the amended provision will see the actual date that an enactment came into force rather than a reference to the date on which it is to come into force.

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Explanatory Notes

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