

Children (Withdrawal from Religious Education and Amendment of UNCRC Compatibility Duty) (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 Children (Withdrawal from Religious Education and Amendment of UNCRC Compatibility Duty) (Scotland) Bill, introduced in the Scottish Parliament on 30 April 2025.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 66–FM);
 - a Policy Memorandum (SP Bill 66–PM);
 - a Delegated Powers Memorandum (SP Bill 66–DPM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 66–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. These 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 a part of a section does not seem to require any explanation or comment, none is given.
5. In these Notes, the Education (Scotland) Act 1980 is referred to as “the 1980 Act” and the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 is referred to as “the 2024 Act”.

Crown application

6. Section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”) provides that the Crown will be bound by an Act of the Scottish Parliament or Scottish statutory instrument unless the provision expressly exempts it. As such,

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technically this Bill applies to the Crown in the same way as it applies to everyone else. Section 1 of the Bill amends the 1980 Act, which predated ILRA and did not bind the Crown when enacted – and so the amendments of it made by the Bill will also not bind the Crown. Section 2 of the Bill amends the 2024 Act, which binds the Crown, and the Bill does not change that.

Overview of the Bill

7. The purpose of the Bill is twofold, with both purposes relating to the United Nations Convention on the Rights of the Child (“UNCRC”).

8. The first purpose of the Bill is to amend the 1980 Act to require that a pupil’s views are considered when parents or carers are exercising their existing right to withdraw the pupil from religious observance and religious and moral education, in order to support compliance of the 1980 Act with the UNCRC.

9. The second purpose of the Bill is to amend the 2024 Act in order to add an exception to the duty on public authorities under section 6 to act compatibly with the UNCRC, in circumstances where the authority is compelled to act incompatibly in reliance on another Act of the Scottish Parliament. This is intended to remove the potential for public authorities to have to decide whether to act in a way that puts them in breach of the compatibility duty in the 2024 Act or to act in a way that puts them in breach of another statutory duty.

Commentary on provisions

Part 1 – Pupil’s involvement in decision about withdrawal from religious instruction or religious observance

Section 1: Pupil’s involvement in decision about withdrawal from religious instruction or religious observance

10. Section 9 of the 1980 Act gives parents of pupils in public schools and grant-aided schools the right to withdraw the pupil from religious instruction or religious observance. A parent might seek to withdraw a pupil from both religious instruction and religious observance or from either of them or from only certain aspects of either of them. Section 1 of the Bill sets out a new process for taking account of the pupil’s views when a request to withdraw a pupil is made.

11. Section 1 inserts a new section 9A into the 1980 Act to set out the new process.

12. Under section 9A(2), when a withdrawal request is received from a parent, the operator of the school (as defined in new section 9A(7)) must tell the pupil that the request has been made and also that the pupil has the right to object to withdrawal. The operator must give the pupil the opportunity to express the pupil’s views about the withdrawal request. The pupil should be able to offer views in the manner that the pupil

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prefers. If the pupil has not expressed a preference, or it is not reasonable to accommodate the pupil's preference, then the manner of expressing views should be one that is suitable to the pupil.

13. An operator does not need to comply with section 9A(2) if the operator is satisfied that the pupil is not capable of expressing a view – but must presume that the pupil is capable of doing so unless the contrary is shown.

14. If, once the operator has complied with subsection (2), the pupil objects to all or part of the withdrawal request, the operator must seek to discuss the objection with the pupil and the parent. It is likely that guidance will be made to set out the way in which such engagement should be carried out. The operator must have regard to any views expressed during any discussion which takes place. The Bill will not require a parent or pupil to take part in a discussion.

15. If the pupil objects to all or part of the withdrawal request, the operator is not to give effect to the withdrawal request to the extent that the pupil objects. So, if a pupil does not object to the request, the withdrawal request will be granted in full. If a pupil objects to all of the request, none of it will be granted. If a pupil objects only to part of the request, then the part of the request to which the pupil has not objected will be granted. To give an example, if a parent requests that a pupil is withdrawn from both religious instruction and religious observance and the pupil objects only to being withdrawn from religious observance, the part of the request relating to religious instruction will be granted.

16. Section 1 also inserts a new section 9B into the 1980 Act. Section 9B sets out that in carrying out functions under new section 9A, operators must have regard to any guidance that the Scottish Ministers may give about those functions.

Part 2 – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024: Circumstances where incompatible action or failure to act is not unlawful

Section 2: United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024: circumstances where incompatible action or failure to act is not unlawful

17. The 2024 Act incorporates the UNCRC into Scots law. Section 6(1) of the 2024 Act provides that public authorities act unlawfully if they act, or fail to act, in connection with a relevant function in a way that is incompatible with the UNCRC requirements – i.e. the rights and obligations from the convention set out in the schedule of the 2024 Act. Effectively, therefore, it imposes a duty on public authorities to act compatibly with the UNCRC requirements when exercising relevant functions.

18. Even where a relevant function is being carried out, however, an incompatible action or failure to act is not unlawful in certain, limited circumstances. See section 6(4),

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which provides that an incompatible action or failure by a public authority in connection with a relevant function is not unlawful if the public authority was required or entitled to act in the way it did (that is, incompatibly) by words which are not contained in an enactment of a type listed in section 6(2)(b) – that is, by words contained in enactments made by, or by virtue of powers conferred by, the UK Parliament rather than by, or by virtue of powers conferred by, the Scottish Parliament.

19. Further, section 6(4)(b) provides that the public authority does not act unlawfully if it was required or entitled to act incompatibly by words contained in an enactment that is made by, or by virtue of powers conferred by, the Scottish Parliament if the particular words in question were inserted by an enactment made by, or by virtue of powers conferred by, the UK Parliament.

20. Therefore under section 6(4) any requirement or entitlement to act incompatibly which emanates from the UK Parliament will result in a public authority, which is acting in accordance with such a requirement or entitlement, not acting unlawfully. Section 2 of the Bill takes the existing text of section 6(4) of the 2024 Act and replicates it, with no changes to legal effect, as section 6A.

21. Section 2 of the Bill then adds, as section 6B of the 2024 Act, a further exception to the general duty in section 6(1) of the 2024 Act for public authorities to act compatibly with the UNCRC requirements. The effect of section 6B is that an incompatible action or failure by a public authority in connection with a relevant function is not unlawful if, as the result of words in an Act of the Scottish Parliament or in Scottish subordinate legislation which are not derived from a UK enactment, the public authority was required to act in that way – that is, the authority was compelled to act incompatibly by another statutory duty placed upon it. However, the exception only applies to subordinate legislation where the Act of the Scottish Parliament under which it was made prevents removal of the incompatibility – in other words, the incompatibility with the UNCRC requirements is mandated by the parent Act.

22. The legal purpose of section 6B is thus to remove the potential for public authorities to have to decide whether to act in a way that puts them in breach of the compatibility duty in the 2024 Act, or to act in a way that puts them in breach of another legal duty in devolved legislation.

23. The references to the definition of “words” in sections 29 and 30 of the 2024 Act have the effect of excluding from the scope of the new exception words in Acts of the Scottish Parliament or in Scottish subordinate legislation which are inserted by UK enactments – this is in order to avoid duplicating the effect of section 6A(b).

Part 3 – Final provisions

Section 3: Ancillary provision

24. This section gives the Scottish Ministers a freestanding regulation-making power to make any incidental, supplementary, consequential, transitional, transitory or saving

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provision that they consider appropriate for the purposes of, in connection with, or for giving full effect to, the Bill.

25. Subsection (2) allows such regulations to modify any legislation, including the Bill itself once it is enacted: if doing so the regulations would be subject to the affirmative procedure. Otherwise they will be subject to the negative procedure.

Section 4: Commencement

26. This section provides that sections 3 to 5 of the Bill come into force on the day after Royal Assent.

27. Sections 1 and 2 of the Bill come into force on a day appointed by regulations made by the Scottish Ministers. These regulations may make transitional, transitory or saving provision related to commencement and may make different provision for different purposes. These regulations are also required to be laid before the Parliament under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010, but they are not otherwise subject to any Parliamentary procedure.

Section 5: Short title

28. This section provides that the Bill, once enacted, will be referred to as the Children (Withdrawal from Religious Education and Amendment of UNCRC Compatibility Duty) (Scotland) Act 2026.

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