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

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This Bill seeks to incorporate the United Nations Convention on the Rights of the Child into Scots law. Public authorities, including Scottish Ministers, will be legally obliged to respect children's rights, and rights-holders will be able to challenge public authorities in the courts for breaches of their rights.



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# Executive Summary

## Background

The United Nations Convention on the Rights of the Child (UNCRC) is an international treaty setting out civil, political, economic, social and cultural rights that children and young people are entitled to.

The rights in the UNCRC apply to every child and young person whatever their ethnicity, sex, religion, language, abilities or any other status, whatever they think or say, and whatever their family background. The rights include:

- The right to be heard, and have their views taken seriously in all matters affecting them.
- The right to the best possible health care.
- The right to benefit from social security.
- The right to adequate food and housing.
- The right to an education.

It is the most widely ratified treaty in the world; it has been ratified by 196 State Parties (countries). State Parties that have ratified the treaty are required to comply with the treaty articles, according to their own domestic law and policy.

The UK Government has also ratified two out of three optional protocols to the UNCRC. The first on the involvement of children in armed conflict, and the second optional protocol on the sale of children, child prostitution and child pornography.

There have been calls for the direct incorporation of the UNCRC since it was ratified by the UK in 1991, but there has also been over 10 years of campaigning by children, young people and wider civil society to incorporate the UNCRC in Scotland.

## The Bill

The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill ('the Bill') was introduced in the Scottish Parliament by the Deputy First Minister and Cabinet Secretary for Education and Skills John Swinney MSP, on 1 September 2020.

The main purpose of the Bill is to incorporate the UNCRC and the two optional protocols into Scottish domestic law. The aim is to make children's rights real and to achieve a culture of everyday accountability for children's rights across public services in Scotland.

The Bill will mean that public authorities, including Scottish Ministers, will be legally obliged to respect children's rights, and that rights-holders will be able to challenge public authorities in the courts for breaches of their rights.

The Bill includes provisions to:

- Incorporate the UNCRC into Scots law so far as possible within the Scottish Parliament's powers. The incorporated provisions are defined in the schedule of the Bill as the 'UNCRC requirements'.
- Make it unlawful for public authorities to act in a way which is incompatible with UNCRC requirements.
- Give children, young people, and their representatives the power to go to court to enforce their rights.
- Give the Children's Commissioner power to take legal action in relation to children's rights.
- Require Scottish Ministers to make a Children's Rights Scheme setting out arrangements for them to comply with the UNCRC requirements, to be reviewed and reported on annually.
- Require listed public authorities to report on their compliance with the UNCRC requirements every three years; this replaces an existing duty in the Children and Young People (Scotland) Act 2014.
- Place a legal duty on Scottish Ministers to carry out and publish a child rights and wellbeing impact assessment on all Scottish Parliament bills, and most secondary legislation.
- Place a legal duty on a member of the Scottish Government in charge of a bill to make a written statement on the bill's compatibility with UNCRC requirements when the bill is introduced in the Scottish Parliament.
- Require new and old legislation to be read wherever possible in a way that is compatible with the UNCRC requirements; where this is not possible:
  - courts will be able to 'strike down' old incompatible legislation (being legislation which pre-dates the Bill), meaning that it no longer forms part of Scots law; or,
  - make a declaration that new legislation (being legislation which post-dates the Bill) is incompatible with the UNCRC.
- Set up court procedures to address questions about the compatibility of legislation or public bodies' actions with the UNCRC requirements.
- Enable the Scottish Government to change the law, by regulation, to cure incompatibilities with the UNCRC requirements.

The approach taken in the Bill is similar to the framework set out in the Human Rights Act 1998 and the Scotland Act 1998. However, there are some important differences, including in relation to the approach to legislation which is found incompatible with the UNCRC requirements.

The Scottish Government's consultation on UNCRC incorporation showed strong support for UNCRC incorporation, and for the method of 'direct incorporation', where the UNCRC is placed into Scots law, as opposed to developing a separate suite of Scottish children's rights or making changes to domestic legislation, which is the current practice.

# Introduction

The [United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill](#) ('the Bill') was introduced in the Scottish Parliament by the Deputy First Minister and Cabinet Secretary for Education and Skills John Swinney MSP, on 1 September 2020.

The main purpose of the Bill is to incorporate the UN Convention on the Rights of the Child ('UNCRC') into Scottish domestic law ('Scots law').

The Scottish Government's aim is to make children's rights real. The Bill aims to achieve this by creating a culture of everyday accountability for children's rights across public services in Scotland:

“ The Bill will mean that children, young people and their families will experience public authorities consistently acting to uphold the rights of all children in Scotland. Public authorities, including the Scottish Ministers, will be legally obliged to respect children's rights and rights-holders will be able to challenge public authorities in the courts for breaches of their rights. <sup>1</sup> ”

This briefing provides background information on the [UNCRC](#), the [children's rights framework](#) and [human rights framework in Scotland](#). It then considers the [provisions in the Bill](#) with reference to the Scottish Government's consultation on UNCRC incorporation.

# Background

In a letter to all MSPs on the introduction of the Bill, [Together](#), an alliance of children's charities in Scotland, state that the journey to incorporation began when the UK first ratified the UNCRC almost 30 years ago.<sup>2</sup> They note certain milestones, including the creation of the [Children's Parliament](#) and the [Scottish Youth Parliament](#). The letter also states that the campaign to secure children's rights in law has "gathered widespread support across many sectors and professions including health, social work, education and the police".

A range of legislation has introduced a [framework of children's rights in Scotland](#). In particular, the Children and Young People (Scotland) Act 2014, requires Ministers to keep further steps towards 'UNCRC requirements' under review. UNCRC requirements are the obligations set out in the [UNCRC](#) and first two optional protocols to the UNCRC. The Act also requires Ministers and public authorities to report on progress every three years. However, the 2014 Act did not deliver incorporation of the UNCRC.

As well as the campaigning from a wide range of stakeholders, there have been statements from the Scottish Government since 2015, beginning with the commitment to explore incorporation of the UNCRC, to undertake an audit of the most effective and practical way to incorporate, and then finally a commitment to incorporate the UNCRC.<sup>3</sup>

In response to this final commitment, Together and the Children and Young People's Commissioner Scotland set up a short-term UNCRC Incorporation Advisory Group on 18 October 2018. The expert Advisory Group, independent of the Scottish Government, drafted their own version of a Children's Rights (Scotland) Bill to show how the UNCRC could be incorporated into Scots law. This was presented to the Deputy First Minister and Minister for Children and Young People on 20 November 2018 - Universal Children's Day.<sup>4</sup> The proposed Children's Rights (Scotland) Bill formed part of the Scottish Government's consultation on UNCRC incorporation.

## Scottish Government consultation on UNCRC incorporation

The Scottish Government ran a consultation between 22 May and 22 August 2019 on [incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland](#).<sup>5</sup> It received 162 responses.

The largest group of responses came from the third sector - 91. There were also responses from 30 individuals, 29 public bodies, seven academics and seven legal profession/organisations.

The consultation was split into the three themes of:

- legal mechanisms for incorporating the UNCRC into domestic law
- embedding children's rights in public services
- enabling compatibility and remedies.

A popular view (83%) was to push forward with incorporation of the UNCRC at the earliest possible opportunity, and certainly within the current session of the Scottish Parliament, ahead of the development of a [Statutory Human Rights Framework for Scotland](#).<sup>6</sup>

Specific issues raised in the consultation are referred to in the Bill section of this briefing.

## The United Nations Convention on the Rights of the Child (UNCRC)

The UNCRC is an international treaty adopted in 1989 and ratified by the UK in 1991; this means that the UK Government has a legal obligation to implement the treaty. It is an agreed set of minimum child rights standards that governments are expected to do all they can to implement, in terms of law, policy and decisions which impact children, to make sure they comply with their human rights.<sup>1</sup>

The UNCRC has 54 articles setting out civil, political, economic, social and cultural rights that children and young people are entitled to. The Bill provides that every child means every human being below the age of 18 years. The Policy Memorandum states that this in line with recommendations of the [Committee on the Rights of the Child](#).<sup>1</sup>

The rights in the UNCRC apply to every child and young person whatever their “**ethnicity, sex, religion, language, abilities or any other status, whatever they think or say, whatever their family background**” (article 2<sup>7</sup>). This is known as the **non-discrimination article**. It makes up one of the **four “General Principles” articles** which assist in interpreting all the other articles and realising children's rights. The other three articles, based on a UNICEF [summary of the UNCRC](#) are:

- **Best interest of the child** (article 3): the best interests of the child must be a primary consideration in all decisions and actions that affect children.
- **Right to life, survival and development** (article 6): every child has the right to life. Governments must do all they can to ensure that children survive and develop to their full potential.
- **Right to be heard** (article 12): every child has the right to express their views, feelings and wishes in all matters affecting them, and to have their views considered and taken seriously. This right applies at all times, for example during immigration proceedings, housing decisions or the child's day-to-day home life.

The Policy Memorandum explains that articles 1-42 contain the substantive rights and obligations which State Parties (states that have signed a treaty) must uphold and give effect to. These include (based the UNICEF [summary of the UNCRC](#)):

- A child with a disability has the right to live a full and decent life with dignity and, as far as possible, independence, and to play an active part in the community. Governments must do all they can to support disabled children and their families. (article 23)
- Every child has the right to the best possible health. Governments must provide good quality health care, clean water, nutritious food, and a clean environment and education on health and well-being so that children can stay healthy. (article 24)



- Every child has the right to benefit from social security. Governments must provide social security, including financial support and other benefits, to families in need of assistance. (article 26)
- Every child has the right to a standard of living that is good enough to meet their physical and social needs and support their development. Governments must help families who cannot afford to provide this. (article 27)
- Every child has the right to an education. Primary education must be free and different forms of secondary education must be available to every child. Discipline in schools must respect children's dignity and their rights. (article 28)

Articles 43 to 52 concern procedural arrangements for the signature, ratification, and amendment of the UNCRC. They also establish the Committee on the Rights of the Child (CRC) and reporting process for State Parties.

The UNCRC is the most widely ratified treaty in the world; it has been ratified by 196 State Parties.

## Optional protocols

There are three optional protocols to the UNCRC that State Parties can ratify:

1. [Optional Protocol on the involvement of children in armed conflict](#) (in force 2002) <sup>8</sup>
2. [Optional Protocol on the sale of children, child prostitution and child pornography](#) (in force 2002) <sup>9</sup>
3. [Optional Protocol on a complaints mechanism for children \(called Communications Procedure\)](#) (in force 2014) <sup>10</sup>

The UK Government has ratified the first optional protocol on the involvement of children in armed conflict, and the second optional protocol on the sale of children, child prostitution and child pornography. The UK Government has not ratified the third optional protocol. This would allow children to submit complaints regarding violations of their rights under the UNCRC and the first two optional protocols to the Committee on Rights of the Child.

One hundred and seventy State Parties have ratified the first optional protocol on children in armed conflict. One hundred and seventy six State Parties have ratified the second optional protocol. However, only 46 State Parties have ratified the optional protocol on a complaints mechanism.

The status of different treaty ratifications can be viewed on the United Nations Human Rights Office of the High Commissioner: [Status of Ratification Interactive Dashboard](#).

The Policy Memorandum states that international experience suggests that a mixture of law, policy and practice is the best way to progress implementation of the UNCRC.

[UNICEF](#) (created by the UN General Assembly on 11 December 1946, works in over 190 countries and territories to protect children's rights) commissioned a research study on the legal implementation of the UNCRC in twelve countries. <sup>11</sup> It found that there is no single route to implementation of the UNCRC. Few countries analysed had fully incorporated the UNCRC, but where it has happened, according to UNICEF, it has had a

significant effect. The process of incorporation raises awareness of children's rights and the UNCRC in government and civil society. There was evidence of how UNCRC principles are becoming integrated with domestic law, such as article 12 - the right of the child to have their views taken into account, and article 3 - the best interests of the child.

## Committee on the Rights of the Child

The [Committee on the Rights of the Child](#) (CRC) monitors the implementation of the UNCRC and the optional protocols by State Parties. It is made up of 18 independent experts.

Around every five years, the CRC reviews how State Parties are putting the UNCRC into practice. There are six stages in the treaty cycle. Civil society organisations can engage throughout the process, and children can also participate. The UK is required to submit a report every five years, which the CRC then examines and makes recommendations in the form of 'Concluding Observations'.

The monitoring and reporting cycle process is considered in more detail in the SPICe briefing on '[Economic, social and cultural rights some frequently asked questions](#)'.<sup>12</sup>

Scottish Ministers work with the UK Government in reporting to the CRC on the measures adopted which give effect to the UNCRC in relation to devolved matters in Scotland.<sup>1</sup>

The UK's most recent report to the CRC was made in 2015.<sup>13</sup> The CRC examined the UK's progress in May 2016, with Concluding Observations published in July 2016.<sup>14</sup> These were welcomed by the Scottish Government which published two reports which set out "progress in taking forward the CRC's Concluding Observations and planned activity until 2021":<sup>1</sup>

- [Progressing the Human Rights of Children in Scotland: A Report 2015-2018](#)
- [Progressing the Human Rights of Children in Scotland: Action Plan 2018-2021](#)

Based on the current timetable, the [Equality and Human Rights Commission](#) estimates that the UN will publish its recommendations to the UK in late 2022.

## What is incorporation?

The Bill aims to incorporate the UNCRC, but what does incorporation mean and why is it necessary?

Simply put, the UNCRC and optional protocols need to be brought into or drafted into Scots law for their provisions to become enforceable. The reason for this is that the UK takes a "dualist" approach to international law (i.e. international law and national law are viewed as two separate systems). This means that international treaties signed by the UK Government do not normally give individuals legal rights in UK courts. There needs to be UK or (in this case) Scottish legislation to do that.<sup>12</sup>

Incorporating the UNCRC in Scottish law will allow children's rights to be enforced in the courts in Scotland. It will require public authorities and Scottish Ministers, as they do already, to take steps to respect children's rights in their decisions and actions.

There are three main approaches to incorporation:<sup>15</sup>

- Direct incorporation – where the entire treaty is incorporated into domestic law and is directly enforceable before the courts.
- Indirect incorporation – where some effect is given in a treaty in national law (such as through a State's constitution), but where further legislation may be required to make rights enforceable.
- Piecemeal incorporation – where different rights are incorporated on a piecemeal basis through legislation; effectively the approach taken by the Scottish Government to date.

The Scottish Government has opted for direct incorporation in the Bill.

A model for direct incorporation already exists: the Human Rights Act 1998 which, broadly speaking, directly incorporated the European Convention on Human Rights.

## Human rights in Scotland

The Bill is able to build upon the existing the human rights framework. For an overview see the SPICe briefing on [Human Rights in Scotland](#).<sup>16</sup>

Under the **Scotland Act 1998**, all Scottish Parliament legislation must be compatible with the rights set out in the Human Rights Act 1998, which are derived from the European Convention on Human Rights.

The Scottish Parliament also has the power, subject to the usual restraints on competence, to observe and implement international obligations, including international human rights obligations.

The **Human Rights Act 1998** largely incorporates the rights contained in the European Convention on Human Rights into domestic UK law so courts in the UK can hear human rights cases. The Act requires all legislation to be interpreted and given effect to, as far as possible, in a way which is compatible with the Convention rights. The Act makes it unlawful for a public authority to act incompatibly with the Convention rights and allows for a case to be brought in a UK court or tribunal against the authority if it does so.

## First Minister's Advisory Group on Human Rights Leadership

The [First Minister's Advisory Group on Human Rights Leadership](#) was set up to make recommendations on how Scotland can lead by example in the field of human rights. It met for the first time on 17 January 2018<sup>17</sup> and reported on 10 December 2018.<sup>18</sup>

Its principal recommendation was the creation of a new statutory human rights framework for Scotland. This would include:<sup>18</sup>

- **civil and political rights**, restated in abbreviated form from the Human Rights Act 1998
- **economic, social and cultural rights**, such as the right to adequate housing and the right to adequate food
- **an environmental right**, right to a healthy environment
- **rights belonging to different groups**, such as women, disabled people, older people and LGBT people.

This proposal would involve a new Act of the Scottish Parliament incorporating rights from UN and other human rights treaties into Scots law. The Advisory Group proposed that the Act could be legislated for at the start of the next term of the Parliament in 2021. <sup>1</sup>

It would have been possible to incorporate the UNCRC as part of the comprehensive human rights framework. This was considered by the Advisory Group, but it welcomed the Scottish Government's commitment to incorporate the UNCRC and the significant participation from civil society. It therefore encouraged the incorporation of the UNCRC, viewing the process as complementary to the Group's recommendations. <sup>18</sup>

A [National Taskforce for Human Rights Leadership](#) is taking forward the Advisory Group's recommendations. The Scottish Government have kept the National Taskforce advised on the policy development for the Bill, and it is expected that the approach taken can dovetail with any wider approach recommended by the Taskforce in due course. <sup>1</sup>

## Children's rights legislation in Scotland

The Bill will also build upon Scotland's existing children's rights legislation.

[A number of Acts since 1995](#) have embedded principles of UNCRC, and since 2006 the [Getting it Right for Every Child \(GIRFEC\)](#) approach has aimed to bring about a child-centred approach to decision and policy making.

### A timeline of children's rights legislation

While the Bill deals with [full incorporation of UNCRC](#), there are also existing laws in place to protect children's rights. A timeline of legislation giving effect to some of the rights and obligations in the UNCRC is set out below.

**The Children (Scotland) Act 1995** : This Act sets out parental responsibilities and rights (PRRs) in relation to children. This enables those with PRRs (usually parents) to make a range of decisions about children's care and upbringing. Section 11 includes a power for the court to resolve disputes between parents about issues including where the child lives and with whom he or she has contact. The 1995 Act was groundbreaking in its day, aiming to embed the principles of UNCRC articles [1, 3, 5, 9, 12, 18 and 20](#) in domestic law.

**The Standards in Scotland's Schools etc. Act 2000**: Sets out the rights of children to education and the related duties of education authorities <sup>19</sup>. It embeds the principles of [article 29](#) on the goals of education. <sup>1</sup>

**The Commissioner for Children and Young People (Scotland) Act 2003:** This Act created the post of Commissioner for Children and Young People, embedding the principles of [articles 3, 12 and 42](#), on best interests, respect of views and knowledge of rights.<sup>1</sup>

**The Mental Health (Care and Treatment) (Scotland) Act 2003 :** Section 2 of this Act makes provisions around securing the welfare of the child in respect to any treatment given under the Act.

**The Education (Additional Support for Learning) (Scotland) Act 2004 and 2009:** The 2004 Act provides the legal framework for the provision of additional support for learning and was amended by the 2009 Act. It embeds the principles of [articles 6, 23, and 29](#) on right to life, rights of disabled children and goals of education into the education system.<sup>1</sup>

**The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 :** This Act embeds the principle of [article 34](#) on protecting children from sexual abuse and exploitation, introducing improved protections.<sup>1</sup>

**The Adoption and Children (Scotland) Act 2007 :** This Act modernised adoption in Scotland, introducing 'permanence orders' and giving unmarried couples the right to adopt jointly. It embeds the principles of [articles 3, 7, 8, 9, 12 and 21](#) into the adoption system.<sup>1</sup>

**The Protection of Vulnerable Groups (Scotland) Act 2007:** This Act strengthened procedures around individuals working with children, barring those deemed unsuitable and replacing enhanced criminal record certificates with new disclosure records for those working with voluntary groups.<sup>20</sup> This embeds the principles of [articles 3 and 34](#) on best interests of the child and sexual exploitation.<sup>1</sup>

**The Children's Hearings (Scotland) Act 2011 :** This reformed the children's hearings system, embedding the principles of [articles 3, 4, 6, 8, 9, 12, 25 and 40](#) into the system<sup>1</sup> and putting measures in place to ensure hearings take children's views into account. This Act created the role of a National Convener as a figurehead for Children's Panel members, Children's Hearings Scotland was formed to support recruitment, selection and training. It also created a national Safeguarder panel to improve consistency and standards.<sup>21</sup>

**The Children and Young People (Scotland) Act 2014 :** This Act introduced 600 hours of funded early learning and childcare for pre-school children from age three and looked after children from age 2, extended eligibility for aftercare for looked after children to age 25, increased support for kinship carers and placed a corporate parenting duty on certain individuals and organisations.<sup>22</sup>

Section 1 of the 2014 Act requires Ministers to keep under review how better or further effect can be given to the UNCRC requirements as defined in section 4. It also introduced a duty for Ministers to report on progress every three years. This was extended to a range of public authorities in 2017.<sup>1</sup> The UNCRC Bill amends this duty to require a report annually.

The Act also introduced general and individual investigations functions to the role of the Children and Young People's Commissioner for Scotland. This provides a means for the Commissioner to investigate how service providers take account of children's rights generally or in relation to a particular child.<sup>23</sup>

Child Rights and Wellbeing Impact Assessments (CRWIAs) were introduced in 2016 as [part of the implementation strategy](#) under Part 1 of the Children and Young People (Scotland) Act 2014 in an effort to highlight the interests of children and young people. [The UNCRC Bill proposes to introduce a legal duty](#) on Ministers to carry these out.

**The Children (Scotland) Act 2020:** Passed earlier this year, this Act substantially amended the Children (Scotland) Act 1995 and made changes to other legislation affecting children. One policy aim was to enhance the voice of the child in family court cases, in accordance with article 12 of the UNCRC. The Justice Committee was the lead committee on the Bill which became the 2020 Act. In its Stage 1 Report, the Committee emphasised the importance of children being supported through the court process and court processes being child friendly for children's rights to be enhanced in practice.<sup>24</sup>

## Getting it Right for Every Child

Since its introduction in 2006, Getting it Right for Every Child (GIRFEC) has aimed to put children at the centre of all government policies supporting children, young people and their families.

The rights of children and their families under the UNCRC and the [European Convention on Human Rights](#) underpin the GIRFEC approach.

The Scottish Government sets out the GIRFEC approach as<sup>25</sup> :

- Child focused: The child and their family should be at the centre of decision-making.
- Based on understanding of child wellbeing for each child in their specific circumstances.
- Based on identifying needs early in order to avoid bigger concerns down the line.
- Requiring joined up working between children, parents, services and authorities.

# What will the Bill do?

This section considers the Bill's provisions in detail, with reference to views expressed in Scottish Government's consultation.

In summary, the provisions in the Bill will: <sup>26</sup> 1

- Incorporate the UNCRC into Scots law so far as possible within the Scottish Parliament's powers. The incorporated provisions are defined in the schedule of the Bill as the 'UNCRC requirements'.
- Make it unlawful for public authorities to act in a way which is incompatible with UNCRC requirements.
- Give children, young people, and their representatives the power to go to court to enforce their rights.
- Give the Children's Commissioner power to take legal action in relation to children's rights.
- Require Scottish Ministers to make a Children's Rights Scheme setting out arrangements for them to comply with the UNCRC requirements, to be reviewed and reported on annually.
- Require listed public authorities to report on their compliance with the UNCRC requirements every three years; this replaces an existing duty in the Children and Young People (Scotland) Act 2014.
- Place a legal duty on Scottish Ministers to carry out and publish a child rights and wellbeing impact assessment on an all Scottish Parliament bills, and most secondary legislation.
- Place a legal duty on a member of the Scottish Government in charge of a bill to make a written statement on the bill's compatibility with UNCRC requirements when the bill is introduced in the Scottish Parliament.
- Require new and old legislation to be read wherever possible in a way that is compatible with the UNCRC requirements; where this is not possible:
  - courts will be able to 'strike down' old incompatible legislation (being legislation which pre-dates the Bill), meaning that it no longer forms part of Scots law; or,
  - make a declaration that new legislation (being legislation which post-dates the Bill) is incompatible with the UNCRC.
- Set up court procedures to address questions about the compatibility of legislation or public bodies' actions with the UNCRC requirements.
- Enable the Scottish Government to change the law, by regulation, to cure incompatibilities with the UNCRC requirements.

## Part 1 and the Schedule: Incorporation of the UNCRC requirements

The [Policy Memorandum](#) states that the Bill will, "incorporate in full and directly as far as is possible within legislative competence". The Scottish Government is taking a 'maximalist' approach, which means that the rights and obligations in the UNCRC and optional protocols are being incorporated to the maximum extent possible within the powers of the Scottish Parliament. The Scottish Government intend that the Bill will result in the highest protection for children's rights possible within the boundaries of the devolved settlement as provided for in the Scotland Act 1998.

### Section 1 and the schedule: Meaning of the 'UNCRC requirements' and related expressions

**Section 1 and the schedule** of the Bill sets out the 'meaning of UNCRC requirements'. These are rights and obligations from the Convention and the first two optional protocols ratified by the UK which fall within the powers of the Scottish Parliament. The UNCRC requirements are set out in the schedule, the content of which can be changed in the future, [under section 3](#), for example, should the UK ratify the third protocol, or there is an amendment to the Convention or a protocol.

The Bill will incorporate so far as is possible within the Parliament's powers: <sup>1</sup>

- Articles 1 to 42 of the UNCRC.
- Articles 1-11 of the first optional protocol.
- Articles 1-7 of the second optional protocol.

Not all Convention or protocol articles can be incorporated because some are outside the legislative competence of the Parliament. The Policy Memorandum includes a table illustrating the affected articles and the reservations that apply. The Scottish Government has also published a version of the UNCRC requirements showing all the words that have been 'carved out' for this purpose. <sup>27</sup>

For example, article 26(1) provides a right to benefit from social security 'including social insurance'. The words 'including social insurance' are removed because this relates to the reserved matter of national insurance under section F1, schedule 5 of the Scotland Act 1998. Article 10 includes rights relating to family reunification for children living in different countries to their parents. Sections of article 10 have been removed because they relate to the reserved matter of immigration and nationality in section B6, schedule 5 of the Scotland Act 1998.

The UNCRC requirements in the Bill will have effect, "subject to any reservations, objections or interpretative declarations by the United Kingdom as may be in force from time to time". <sup>26</sup> When State Parties ratify the UNCRC, they can do so subject to reservations or declarations. The UK Government made a number of reservations and declarations upon ratification. <sup>28</sup> All the reservations have now been withdrawn, but there are declarations still in force. <sup>29</sup>



## Consultation responses

The consultation asked respondents for their preferred model for incorporating the UNCRC into domestic law. A total of 134 respondents provided written comments to this question.

Just under two-thirds of respondents (82) identified **direct incorporation** as their preferred model of incorporation. Reasons included:

- it does not preclude the option of going further to strengthen children's rights
- the rights set out in the UNCRC are interrelated, interdependent and universal
- it will avoid a piecemeal approach to embedding the UNCRC into domestic law
- it is likely to lead to a clear positive impact on children's wellbeing
- it will ensure children's rights in Scotland stay up-to-date with changes in international children's rights consensus.

Just over a tenth of respondents (15) favoured transposing the UNCRC through a **suite of Scottish children's rights**. Reasons for this included:

- it would allow necessary adjustments to be made through the existing Scottish legislative and social context
- a suite of rights would create less ambiguity and less room for interpretation than a direct incorporation model
- it would sit alongside future intentions to develop a statutory human rights framework for Scotland.

A further four respondents expressed a preference for **transposing the UNCRC through changes to domestic legislation**. Respondents reported that this was the current model that has been working effectively and has ensured a lack of ambiguity in how the UNCRC articles apply to Scottish policy and practice.

Just under a fifth of respondents (25) **expressed uncertainty as to the preferred model and/or could see the benefits and challenges associated with the various options**. Under a tenth expressed a preference to **combine different models** (four), suggesting this approach both would both maintain the integrity of the UNCRC as well as specify how the articles would apply in the Scottish context.

Under a tenth of respondents expressed **general opposition to the incorporation of the UNCRC and/or additional children's rights mechanisms** (four).

## Section 2: Meaning of State Parties and related expressions

Many of the provisions in the UNCRC place obligations on 'State Parties'. The Policy Memorandum states that in practice, the obligations are given effect by, not only central government, but by local government and public sector bodies. While in Scotland, the State Party to the UNCRC remains the UK:

“ on a practical level, effect is given to the UNCRC requirements across the whole system of government and public administration in Scotland, by the actions of many different public authorities and some private bodies undertaking functions of a public nature. <sup>1</sup> ”

**Section 2** will therefore allow references to State Parties or State Party to be read as including references to public authorities under the Bill.

There are also places in the UNCRC which refer to 'jurisdiction' or 'territory' that need to be read as something different to make sense in the domestic context. Section 2 includes a table of articles with these modifications.

## **Section 3: Power to modify the schedule**

Section 3 gives the Scottish Government the power, by regulations, to modify the terms of the terms of the schedule, that is, the 'UNCRC requirements'. This is subject to limitations:  
26

- provisions from the Convention and its first and second optional protocols that are already in the schedule cannot be removed
- provisions can be added that are not already included, or
- adjustments can be made to reflect amendments to the treaties on which they are based.

This would allow for the addition of the third optional protocol if ratified by the UK Government. The regulations to make changes will be subject to the affirmative procedure, meaning that they will need the approval of the Scottish Parliament.

## **Section 4: Interpretation of the UNCRC requirements**

Section 4 sets out that a court or tribunal **may** take into account the texts of the UNCRC and the two optional protocols that have not been incorporated, when they are determining a case. The Explanatory Notes to the Bill state that:

“ 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.”

### **Consultation responses**

The consultation sought views on the interpretation of rights because there is no body of case law on the UNCRC from an international court equivalent to the European Court of Human Rights. This may cause some uncertainty until judgments start to emerge from the Scottish courts. <sup>1</sup>

The most popular view expressed was that General Comments by the UNCRC and Concluding Observations provide valuable guidance and should be used as an aid to interpret and ensure effective implementation of the UNCRC (76 respondents).

Linked to this point, 44 respondents noted that courts should have regard to the CRC's General Comments when determining children's rights cases. A further 16 respondents noted that CRC General Comments and Concluding Observations are not legally binding in international law and should not be given any legal status under domestic law, other than guidance. It was argued that to give the General Comments any legal status would lead to a risk of the Scottish Government having to comply with decisions taken elsewhere:

“ It was suggested that a legal requirement for Scottish domestic law to give effect to recommendations set out in General Comments or Concluding Observations would make the UN Committee the ‘arbiter of children's rights in Scotland’, circumventing the Scottish Parliament and preventing Scotland from development more stringent requirements to protect children's rights. This point was raised by over a tenth of third sector organisations (10 respondents).<sup>6</sup> ”

There were also views expressed about the need to learn from other countries where the UNCRC has been incorporated into domestic law. In particular, how UNCRC rights have been actioned or interpreted through courts. Norway, Sweden and Spain were cited repeatedly as countries where case law is developing that could be used by courts in Scotland to aid interpretation.<sup>6</sup>

## **Section 5: Duty to modify section 4 on ratification of the third optional protocol to the Convention**

In the event that the UK Government ratifies the third optional protocol, section 5 requires the Scottish Government to amend section 4 by regulations as they consider appropriate, to take account of it. This would be subject to the negative procedure. This means that the regulations can be made and brought into force, but which the Parliament can annul by a vote in the Chamber.

## **Part 2: Duties on public authorities and the role of the court**

Section 6 would place a **duty on public authorities** not to act in a way which is incompatible with the UNCRC requirements (as set out in the schedule of the Bill).

Part 2 also sets out that there are [judicial remedies](#) should public authorities fail to comply with that duty. (Broadly speaking, these are next steps which a court or tribunal takes, or authorises, with the aim of resolving the legal dispute at issue.) Part 2 proposes that existing courts and tribunals (as opposed to a new judicial body) would authorise the judicial remedies in question.

Part 2 of the Bill has a number of similarities with provisions in the [Human Rights Act](#).

## The general approach in Part 2

This part of the briefing considers the general approach in Part 2, followed by [more detailed consideration](#) of specific aspects of Part 2.

### Background

For the purposes of understanding Part 2 (as well as [Part 4](#) and [Part 5](#)) it's helpful to note the distinction between the civil courts and criminal courts.

**Civil courts and specialist tribunals** resolve a wide range of disputes, including between individuals and public authorities, using diverse judicial remedies the courts and tribunals have available to them. The **criminal courts**, on the other hand, deal with conduct serious enough to be recognised as a criminal offence, with the aims of punishing and rehabilitating offenders and protecting the public.

Scottish courts and tribunals already play an important role in the oversight of public authority decision-making. Part 2 of the Bill would build on, and work alongside, the existing procedures provided for this purpose by courts and tribunals.

As one example of the courts' existing oversight role, there may be a **right of appeal** to a civil court or tribunal relating to a public authority's decision on a particular issue.

Several areas of law also allow a person to **claim damages** (a sum of money) through the civil courts from a public authority if something goes wrong. For example, in some circumstances, this is possible under the law of negligence. Damages in this context aim to compensate someone for the loss they have suffered (as much as money can do that).

In some circumstances, a person or organisation can raise an action for **judicial review** in the [Court of Session](#) in Edinburgh (the highest civil court based in Scotland). This is an important area of oversight in practice. Unlike some rights of appeal, the judicial review procedure is primarily concerned with **the lawfulness of official decision-making, or the procedure followed**, rather than the substance of decisions themselves.

There are various grounds of judicial review. For example, the court might be asked to consider if there has been a breach of the Convention rights protected under the [Human Rights Act](#) or [Scotland Act](#) (referred to as 'the Convention rights' in this briefing).

A range of judicial remedies may be awarded by the court at the end of a successful judicial review case, depending on the circumstances. This includes quashing the original decision by the public authority and asking it to consider the issue again. Damages, although not the main legal remedy, can be awarded in some circumstances, for example, where there is a breach of Convention rights.<sup>30</sup>

## Consultation responses

The Scottish Government [consultation](#) asked whether the Bill should contain a regime which allows right holders to challenge the actions of public authorities on the grounds they are incompatible with the UNCRC rights in the proposed Bill. <sup>5</sup>

There was strong support for this, with **81% of respondents to the consultation** agreeing with the need for such a regime. <sup>6</sup> The small number of respondents who did not agree were concerned about the potential for increased litigation and expressed a preference for dialogue over legal processes.

Respondents who were supportive said it was important that **the processes used were child-friendly**.

Some respondents also highlighted that children and young people faced more **barriers to accessing the legal system** than most adults. Accordingly, they said it was important children and young people nationwide had access to **advocacy services and legal representation** to support them through the process. The ease with which the most vulnerable children, including [looked after children](#), could access the system was particularly highlighted by some respondents.

[CLAN Childlaw](#) commented specifically on **legal aid for children**:

“ In Scotland since January 2011, for children to obtain legal aid in most civil cases, the resources of parents (or others liable to support children) have to be taken into account when assessment is made of the child’s financial eligibility for legal aid, unless it would be “unjust or inequitable” to do so. This results in many children finding it impossible to access confidential and independent legal advice and representation. ”

Scottish Government, 2019<sup>31</sup>

One suggestion made was the creation of **an independent children's rights tribunal** with legally-aided advocacy and representation to support the hearing of complaints and access to remedies.

Given the barriers to children and young people accessing the legal system, some respondents also felt that **a responsive complaints system in the public authority concerned** was important, as well as court-based processes being available.

## Part 2: in more detail

This section of the briefing considers specific aspects of Part 2 in more detail.

### Section 6: what is a 'public authority'?

As noted earlier, **section 6 of the Bill** makes it unlawful for a public authority to act, or fail to act, in a way which is incompatible with UNCRC requirements. This is similar to, but not identical to, the duty contained in section 6 of the [Human Rights Act](#).

The definition of a **public authority** follows the general approach in the [Human Rights Act](#). It is not exhaustively defined in the Bill, although its meaning has been extensively considered in a human rights context before the UK courts. <sup>32</sup>

In particular, section 6 recognises the possibility of a **'hybrid' authority**, carrying out a mixture of public and private functions. In relation to Convention rights, there have been a number of significant legal cases on which hybrid bodies fall within the scope of a public authority.

Section 6 also says a public authority would include a **court or tribunal** itself.<sup>33</sup>

**Section 9 of the Bill** sets out the specific process which would be used when a court is considering whether another court or tribunal's decision (a judicial act) is compliant with section 6. A key aim here is to preserve the existing court hierarchy in the Scottish court system.<sup>34</sup> The process for judicial acts differs from the process used in other circumstances, which is found in [section 7](#).

Section 6 also says a public authority would include the [Scottish Ministers](#), but **not** the [Scottish Parliament](#).<sup>35</sup>

Notwithstanding the current approach in the Bill, the [Policy Memorandum](#) (at para 125) says it would be desirable if the duty on public authorities applied to the Scottish Parliament across all its functions. However, it also says the Scottish Government recognises that further consideration requires to be given by the Parliament itself to how the requirements of the Bill should be applied to its functions. The Government states that it looks forward to working with the Parliament on this issue as parliamentary consideration of the Bill progresses.

## **Section 7: court proceedings in respect of unlawful acts**

As in the [Human Rights Act](#), **section 7 of the Bill** says that the public authority's duty to comply with the UNCRC requirements might be considered by courts and tribunals in two ways:

- An individual or organisation would be able to **raise specific court proceedings** against a public authority in a **civil court or tribunal** relating to the UNCRC requirements.<sup>36</sup> For example, an individual or organisation could raise judicial review proceedings in the [Court of Session](#) in Edinburgh.
- An individual or organisation could invoke the UNCRC requirements against a public authority **in any court or tribunal proceedings**, civil or criminal.<sup>37</sup> So, for example, if a local authority was attempting to evict someone through the courts, that individual's defence might refer to the UNCRC requirements.

In relation to the first bullet point, see the later sections of the briefing on [who can bring court proceedings](#), as well as [the time limits for doing so](#). In relation to both bullet points, see later in the briefing on the [judicial remedies](#) which can be granted by the court.

## Sections 7 and 10: who can bring court proceedings?

### *General*

Section 7(1) says that a **person**, defined to include an individual or organisation,<sup>38</sup> can raise court proceedings in respect of the UNCRC requirements.

The Scottish Government intends that section 7(1) would interact with existing law which can require the individual or organisation to have **standing**.<sup>39</sup> In other words, that that individual or organisation has satisfied a specific test which determines whether they can bring a court action in the individual case.

To have standing in judicial review proceedings, other than those proceedings relating to Convention rights, the individual or organisation must have **sufficient interest** in the subject matter of the case.<sup>40 41</sup> This test is flexible enough to allow a public interest group or organisation to represent individuals whose rights have been infringed in some circumstances.

### *The role of the Children's Commissioner*

**Section 10 of the Bill** would give [the Children and Young People's Commissioner in Scotland](#) ('the Children's Commissioner') a power to bring court proceedings under section 7 of the Bill in respect of the UNCRC requirements.<sup>42</sup>

Section 10 does **not** explicitly state that the Children's Commissioner has automatic standing (sufficient interest) in judicial review proceedings. However, the Scottish Government has said that it considers that the Commissioner would be able to demonstrate sufficient interest in relevant cases.<sup>43</sup>

Separately, section 10 of the Bill gives the Commissioner the power to **intervene** (i.e. make representations) in court proceedings.<sup>44</sup> It does not say whether these would be written or oral representations.

### **Part 4 and 5 of the Bill: the role of the Children's Commissioner**

Note that in Part 4 of the Bill the [Children's Commissioner](#) has separate powers to [join legal proceedings](#) where a court is considering the compatibility of legislation with the UNCRC requirements.

The [Children's Commissioner](#) also has a power to intervene in court proceedings under [Part 5 of the Bill](#). Under this procedure a higher court can be asked to make a determination on compatibility with the UNCRC requirements by a lower court.

### *Consultation responses*

The [Scottish Government consultation](#) asked whether there should be a **special test relating to standing** in the Bill for court proceedings relating to the UNCRC requirements.

The most popular view was that the current test in judicial review proceedings (**sufficient interest**) was the appropriate one, as opposed to the **victim test** which applies in Convention rights cases.<sup>6 45 46</sup> (The victim test requires you to be personally affected by the act or omission you are complaining about, or likely to be so affected. Various Scottish public interest organisations have argued the test is too restrictive and is a barrier to legal challenges by such organisations on behalf of affected individuals.)<sup>47</sup>

Children and young people responding to the consultation said it would be unfair to require children themselves - particularly young or vulnerable children - to bring cases directly in court. Accordingly, an adult or organisation should be able to do it for them.

Related to this, respondents to the consultation also said that **automatic standing** should be given to the [Children's Commissioner](#), the [Scottish Human Rights Commission](#) and the [Equality and Human Rights Commission](#), with the position of the Children's Commissioner being the subject of repeated references by respondents (including the Children's Commissioner).

One (legal) organisation said that standing should be given to individuals including anyone with [parental responsibilities and rights](#) (PRRs) in respect of a child. PRRs are typically held by one, or both, of the **child's parents** (although other individuals may hold them too).<sup>6</sup>

## Section 7: the time limits for bringing court proceedings

Section 7 of the Bill sets out **time limits** for bringing court proceedings under the Bill. This issue was not a discussion topic in [the Scottish Government's consultation](#).

When setting statutory time limits in court proceedings affecting public authorities, the policymaker is usually trying to strike a balance between allowing **access to justice for affected individuals**, while offering **certainty for public authorities**.<sup>1 48</sup> (Certainty comes from the setting of a point past which public authorities know their decisions cannot be challenged).

In 2014, the **law on judicial review** was reformed so that, unless the court agreed to an extension, an individual or organisation would have **three months** from the date of the act or omission complained of to bring court proceedings.<sup>49</sup> In relation to this change, one additional policy driver was avoiding excessive delay in policy-making associated with lengthy legal challenges to decisions made by public authorities.<sup>50</sup>

### *A default rule of one year*

Under section 7 of the Bill, how long someone has to raise court proceedings will ultimately depend on the type of court procedure they are using.

Section 7 sets out a **default rule of one year** from the date of the act or omission complained of. This applies if there are not more stringent requirements associated with the particular court procedure being used. The court may extend the one year deadline "if it considers it equitable to do so."<sup>51</sup>



For judicial review proceedings, the effect of section 7 is that the procedure's usual **three month time limit would apply**, unless the court extends the deadline (as equitable in the circumstances) or unless a shorter time limit applies by virtue of another statute.<sup>52</sup>

### *Under 18s and the time limit*

When calculating the one year time limit under section 7 of the Bill, **any period for which a person is under 18 is to be excluded**. This also applies to the three month time limit for judicial review claims.<sup>53</sup>

As under 18s are the right holders in the UNCRC, this seems likely to impact on the relevant time limits in a significant number of cases.

The [Policy Memorandum](#) says the Scottish Government favours this approach because of the additional barriers children face in realising their rights and seeking access to justice. It argues that this is particularly so for those with additional needs or those experiencing violence, abuse and trauma.<sup>1</sup> It does not think the power of the court to extend the deadline offers a sufficient solution to these issues.<sup>1</sup>

## **Section 8: the remedies a court or tribunal can grant**

### *What section 8 says*

**Section 8 of the Bill** lays down what a court or tribunal can do if it finds that a public authority has acted, or proposes to act, in a way which is incompatible with the UNCRC requirements.

Section 8 proposes that a court or tribunal would be able to grant any legal remedy that it ordinarily has power to grant.<sup>54</sup>

Depending on the court or tribunal, and on the court procedure involved, remedies might include, for example:

- **an interdict**, an order to stop an act which is threatened or is ongoing
- **a specific implement**, an order requiring a person or organisation to do something they are legally required to do
- **damages**, an order to pay a sum of money
- **a declarator**, a statement by the court relating to a specific legal right or duty
- **reduction**, which involves the court quashing the original decision and giving the issue back to the decision maker to look at again
- **statutory remedies**, remedies provided under particular statutes for particular cases.

It is important to note that not all remedies will be available in all courts and tribunals.

Scottish Ministers have the power, under section 7, **to add to available tribunal remedies** by secondary legislation "if they consider it necessary."<sup>55</sup> No further detail is provided in the documentation associated with the Bill on the circumstances in which they might do this or how widespread this exercise might be in practice.

**Section 8 of the Bill** sets out the proposed basis on which the court or tribunal should consider whether to make **an award of damages**, and how much to award. This is where the particular court or tribunal has the power to award damages in the first place.

The court or tribunal would be required to consider those questions on the basis of what is necessary to provide **just satisfaction** to the person.<sup>56</sup> This is also the principle underpinning awards of damages under section 8 of the [Human Rights Act](#).

### *Consultation responses*

There was a specific question in [the Scottish Government consultation](#) on **how damages should be assessed**,<sup>57</sup> but not on the wider issue of the range of judicial remedies which should be available.

As now appears in the Bill, the Government suggested damages should be considered in terms of what is necessary to provide **just satisfaction**. It asked for views on whether this was the correct approach.<sup>57</sup> Of those respondents who answered the relevant question, **67% were in favour of this**. (5% were against and 28% did not know.)<sup>6</sup>

One view expressed in a number of responses was that **guidance** would be required on levels of damages awards to enable a fair and transparent system.<sup>6</sup>

Another theme in the responses was that compensation should be **part of a wider package of measures to promote physical and psychological recovery**. Furthermore, there should be a **child-centred approach** to just satisfaction, putting the needs of children above others affected.<sup>6</sup>

Respondents also stressed there should be **wider consequences for public authorities**. One individual commented as follows:

“ Financial compensation has value, but it is not sufficient....redress...should include a legal requirement for immediate structural change in the offending institution, monitored by the courts, to address potential further abuse.”

Arad Research (for the Scottish Government), 2019<sup>6</sup>

A number of respondents stressed the need for **an appropriate and proportionate approach** to damages. They were concerned about a culture of speculative legal claims developing and an associated **impact on public sector service delivery**.<sup>6</sup>

A group of academics from the [University of Strathclyde's Law School](#) said that damages under the [Human Rights Act](#) are not meant to compensate financially for the extent of the loss suffered, but to give recognition that a breach has occurred. They suggested avoiding

using the term 'financial compensation' in the Bill, as this risks promising to aggrieved parties far more than the academics assumed the Bill is intended to give. <sup>6</sup>

### **The public authority duty and secondary legislation**

There is one final issue which the Scottish Government's [consultation](#) considered in the context of what is now Part 2 of the Bill. This is what a public authority should do if it is faced with **existing secondary legislation** which appears incompatible with a UNCRC requirement. Should the duty on a public authority ([which now appears in section 6](#)) require it to ignore such incompatible secondary legislation, even though the secondary legislation remains in force? <sup>5</sup>

**Seventy nine percent of those respondents** answering the relevant consultation question answered 'yes', they should be required to ignore it (with 5% saying 'no' and 16% saying they didn't know). <sup>6</sup>

On the issue of the duty on public authorities and incompatible secondary legislation, the Scottish Government has commented as follows to SPICe:

“ The effect of the Bill will be that public authorities under the duty in s.6(1) must act in a way which is not incompatible with the incorporated rights and requirements in all circumstances. The policy intention is to provide the highest protection possible for children’s rights within the powers of the Scottish Parliament... If circumstances were identified which would mean that a public authority might be required to act incompatibly due to a provision in secondary legislation we expect that the remedial powers in [Part 6 of the Bill](#) could be used to remedy such legislation. It is possible that a public authority might be subject to challenge in the courts in relation to action required of them by secondary legislation. We would expect the approach of the courts to turn on the circumstances of the case.”

Scottish Government, 2020<sup>39</sup>

## **Part 3: Children's Rights Scheme, child rights and wellbeing impact assessments and reporting duties**

Part 3 of the Bill contains provisions to **promote transparency in relation to public authorities' duties** to be compatible with the UNCRC requirements (as set out in [Section 6 of the Bill](#)).

### **Sections 11 - 13: Establishing a Children's Rights Scheme**

The Bill requires Scottish Ministers to publish a Children's Rights Scheme (the Scheme) to report on compliance with the UNCRC requirements. An annual report under the Scheme will look at steps taken and planned actions for the year ahead.

The Policy Memorandum states that the Scheme, "...is considered to be a further way that proactive realisation of children's rights is delivered in practice." <sup>1</sup>

Publishing a Children's Rights Schemes will not be mandatory for all public authorities, but the Policy Memorandum states that the intention is for the Scottish Government to set an example to other authorities and encourage them to publish their own Schemes where appropriate.

**Section 11** sets out that Scottish Ministers must make a Children's Rights Scheme (the Scheme) to ensure compliance with [Section 6 obligations](#) to not act in a way that is incompatible with UNCRC requirements.

The [Policy Memorandum](#) states that the intention for the Scheme is to build on planning and reporting duties set out in the Children and Young People (Scotland) Act 2014 in order to ensure clear planning and reporting duties and proactive consideration of children's rights. Building on the Welsh Children's Scheme outlined in the [Rights of Children and Young Persons \(Wales\) Measure 2011](#), the Scheme is also intended to "...aid transparency and scrutiny of how the Scottish Ministers fulfil their obligations under the [UNCRC] Bill". <sup>1</sup>

**Section 11 (3)** of the Bill states the Scheme may include arrangements for Ministers to:

- **Ensure children can participate** in decision making affecting them.
- **Raise awareness** of children's rights.
- **Consider children's rights** during the Budget process.
- Ensure their actions contribute to any national outcome for children determined by them under [Part 1 of the Community Empowerment \(Scotland\) Act 2015](#) <sup>58</sup>.
- Prepare Children's Rights and Wellbeing Impact Assessments (CRWIA).

**Section 11 (4)** says the first Children's Rights Scheme must specify when the first report on its operation will be published and include actions Ministers will take following the establishment of the scheme and in the lead-up to the first report on its operation.

The [Policy Memorandum](#) states that the Children's Rights Scheme will also include detail on strategic decisions for which Scottish Ministers will undertake CRWIAs.

**Section 12** sets out the procedure for making, amending and remaking the scheme. The steps for initial preparation of the Children's Rights Scheme and any proposals to amend or replace it thereafter are set out in the Explanatory Notes for the Bill <sup>26</sup> as follows:

**Step 1: Preparation.** Scottish Ministers must prepare proposals, with regard to any relevant UNCRC materials as set out in 12 (2) and any other relevant documents.

**Step 2: Publication and consultation.** Scottish Ministers must publish the prepared proposal and consult on it with children, the Commissioner for Children and Young People in Scotland and any other appropriate organisations/individuals. Following consultation, appropriate amendments may be made.

**Step 3: Laying before Parliament and making.** Once consultation has taken place and 28 days have passed since publication, Scottish Ministers can lay the proposal before Parliament for debate. The Scheme can only be made once the proposal has been laid. Following this, 12 (7) states Scottish Ministers should publish the scheme "in such manner as they consider appropriate".

**Section 13** requires Scottish Ministers to review and report on the Scheme on an annual basis, publishing a report of findings.

### Consultation responses

The consultation asked respondents whether the Bill should include a requirement for the Scottish Government to produce a Children's Rights Scheme, similar to the [Children's Rights Scheme in Wales](#). Of those who answered, 89% were in favour of this.<sup>6</sup>

Just over a third of respondents providing comments expressed the view that a Scheme would contribute to greater accountability and establish a system for Scottish Ministers and the Scottish Government to demonstrate compliance with UNCRC duties.<sup>6</sup>

Over a quarter of those who commented stated establishing a Scheme was a way of creating opportunities for children, young people and wider stakeholders to inform implementation of UNCRC.<sup>6</sup>

A fifth of those commenting stated a Scheme would strengthen and/or embed children's rights, while over a tenth said a Scheme would help ensure transparency in the realisation of children's rights.<sup>6</sup>

Fewer than 10% of respondents did not want the Scheme included in the legislation with respondents stating it was not needed, may cause confusion or result in a dilution of rights.<sup>6</sup>

## Section 14: Child rights and wellbeing impact assessments

Following the passage of the Children and Young People (Scotland) Act 2014, Child Rights and Wellbeing Impact Assessments (CRWIAs) were initially introduced<sup>59</sup> as "a tool to help inform and meet" its duties.<sup>60</sup> **Section 14** will now place a legal duty on Scottish Ministers to carry out a Child Rights and Wellbeing Impact Assessment (CRWIA).

The Explanatory Notes state that the purpose of CRWIAs 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. ”

Scottish Parliament, 2020<sup>26</sup>

**Section 14 (2)** sets out that a CRWIA must be prepared for:

- all primary legislation in the Scottish Parliament that the Scottish Ministers intend to introduce
- a Scottish statutory instrument made by Scottish Ministers, other than one which brings in a provision of an Act of the Scottish Parliament or an Act of Parliament into force.

The reason for the exception for secondary legislation which brings primary legislation into force is that such legislation does not contain substantive provisions and also because a CRWIA and statement of compatibility would have been provided anyway in relation to the parent Act. <sup>1</sup>

Scottish Ministers will also be required to carry out an impact assessment in respect of decisions of a strategic nature. Details on this will be included in the Scheme.

**Section 14 (4)** requires Scottish Ministers to include a statement in the Children's Rights Scheme setting out the circumstances in which a CRWIA should be prepared. **Section 14 (5)** places a duty on Ministers to publish CRWIAs .

The Bill does not make provision for members' bills and other non-government bills to include CRWIAs as:

“ The Scottish Government considers it is appropriate for parliament itself to consider whether these requirements should apply to members' bills and other non-Government Bills. ”

Scottish Parliament, 2020<sup>1</sup>

The Policy Memorandum also notes the need to ensure balance between mandatory provision for CRWIA and ensuring their effectiveness, stating:

“ The Scottish Government believes the Bill strikes the right balance by placing mandatory duties on the Scottish Ministers and allowing for more flexibility for public authorities, ensuring that capability and capacity can be built within public authorities rather than adding potentially overly administrative requirements on all public authorities.”

Scottish Parliament, 2020<sup>1</sup>

## Consultation responses

**A tenth of respondents** providing comments mentioned the inclusion of CRWIAs. Their inclusion was seen as a preventative and proactive way of taking forward UNCRC incorporation. <sup>6</sup>

The role of CRWIAs in supporting the Children's Rights Scheme was highlighted by a **quarter of respondents**, with many highlighting that CRWIAs were already introduced and they could be strengthened by making their use mandatory. <sup>6</sup>

**Just over a quarter** of respondents stated that CRWIAs could play an important role in collecting monitoring data and measuring impact following UNCRC implementation. The need for guidance and training was also highlighted.<sup>6</sup>

In response to a question on whether all legislation should be accompanied with a statement of compatibility with children's rights, **over a quarter** of those providing comments took the view that any statement should be linked with the introduction of CRWIAs.<sup>6</sup>

## **Section 15 and 16: Reporting duties of listed authorities**

**Section 15** requires public authorities listed in **Section 16** to publish a report every three years on actions taken to ensure compliance with UNCRC requirements set out in [Section 6 of the Bill](#). The first three year reporting period begins on the day Section 15 comes into force.

**Section 15 (1)** sets out reporting duties of authorities listed in **16 (1)**. The listed authorities are detailed below and are the same as those in schedule 1 of the Children and Young People (Scotland) Act 2014.<sup>26</sup>

Authorities listed in Section 16 (1) are:

- Local authorities
- Children’s Hearings Scotland
- the Scottish Children’s Reporter Administration
- Health boards
- Healthcare Improvement Scotland
- The Scottish Qualifications Authority
- Skills Development Scotland
- Social Care and Social Work Improvement Scotland
- The Scottish Social Services Council
- The Scottish Sports Council
- The chief constable of the Police Service of Scotland and the Scottish Police Authority
- The Scottish Fire and Rescue Service
- The Scottish Legal Aid Board
- The Mental Welfare Commission for Scotland
- The Scottish Housing Regulator
- Bòrd na Gàidhlig
- Any integration joint board to which functions in relation to persons under the age of 18 are delegated in pursuance of an integration scheme prepared under section 1 or 2 of the Public Bodies (Joint Working) (Scotland) Act 2014
- ILF Scotland.

**Section 15 (2)** enables two or more listed authorities to publish a joint report. **Section 16 (2)** enables Scottish Ministers to add or remove authorities, however **16 (4)** sets out that they must first contact the authorities concerned before adding or removing.

In addition, Part 2 of the [Children and Young People \(Scotland\) Act 2014](#), setting out duties of public authorities,<sup>61</sup> will be replaced by Sections 15 and 16 of this Bill.

### Consultation responses

The consultation asked if respondents agreed there should be a duty to comply with UNCRC rights. **77%** of respondents said they believed there should be, while **4%** did not agree.



The most widely held view from respondents was that:

“...a duty to comply will ensure full legal compliance with UNCRC, by identifying an unequivocal responsibility for public authorities within Scottish domestic legislation.”

Arad Research (for the Scottish Government), 2019<sup>6</sup>

Over a quarter of respondents providing comments stated that a duty to comply will ensure legal redress, while a quarter indicated that a duty to comply is a more robust mechanism than a duty of due regard.<sup>6</sup>

Under a tenth of respondents indicated that a duty to comply will have resource implications for public bodies. The need to ensure public authorities are provided with guidance on implementing new duties was also highlighted.<sup>6</sup>

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

**Section 17** repeals the reporting duties outlined in Part 1 of the [Children and Young People \(Scotland\) Act 2014](#). Section 1 of the 2014 Act will be replaced by the reporting duties included in section 13 of the Bill, and section 2 (and schedule 1) of the 2014 Act will be replaced by sections 15 and 16 of the Bill.

Scottish Ministers are currently required to lay a report before Parliament every three years.<sup>62</sup> This will be replaced by the requirement to review and report on the Scheme on an annual basis, as set out in .

## Part 4: Legislation and the UNCRC requirements

Part 4 deals with legislation's compatibility with the UNCRC requirements, as defined by section 1.

Part 4 of the Bill has similarities with provisions in the [Human Rights Act](#) and the [Scotland Act](#), with some important differences as well.

## Section 18: statements of compatibility in relation to legislation

Under **section 18(1), Government Bills** introduced in the Scottish Parliament would require to be accompanied by a statement from the Member introducing the Bill about the Bill's compatibility with the UNCRC requirements. This requirement would **not** extend to [other types of Bill, such as a Committee Bill or a Member's Bill](#).

Under the current law, the Member introducing a Bill must make a statement on whether the Bill is within the legislative competence of the Scottish Parliament in terms of the [Scotland Act](#) (which includes that it is compatible with Convention rights.)<sup>63</sup> This requirement to make a statement extends to Committee Bills and Members' Bills.

For secondary legislation, **section 18(2)** of the Bill makes equivalent provision to section 18(1) for [Scottish Statutory Instruments](#) other than those bringing primary legislation into force.

### Consultation responses

The [Scottish Government consultation](#) asked whether any legislation introduced to the Scottish Parliament (i.e. not restricted to Government Bills) should be accompanied by a statement of compatibility with children's rights. <sup>5</sup> **92% of those answering the relevant question** supported this (4% said 'no', and 5% said they didn't know). <sup>6</sup>

## Section 19: interpretation of legislation

**Section 19(1) of the Bill** would require that certain types of legislation (whenever made) must, so far as possible, be interpreted and given effect in a way that is compatible with the UNCRC requirements (**the interpretative obligation**). There are similar duties in the [Human Rights Act](#) and the [Scotland Act](#).

Section 19 applies to both **Acts of the Scottish Parliament** and **Acts of the UK Parliament**, as well as **secondary legislation** wholly or partly made by such primary legislation. <sup>64</sup>

However, the interpretative obligation does **not** apply to legislation which it is not within the legislative competence of the Scottish Parliament to make, meaning only certain Acts of the UK Parliament fall within its scope. <sup>64</sup>

For example, the obligation could apply to a provision in a **pre-devolution Act of the UK Parliament** covering what is now a devolved area. It could also apply to a provision in a **post-devolution Act of the UK Parliament** in a devolved area, where the Scottish Parliament had given the UK Parliament permission to legislate on its behalf.

### Consultation responses

The [Scottish Government consultation](#) asked whether the Bill should contain "strong provisions" requiring an Act of the Scottish Parliament to be interpreted and applied so far as possible in a manner which is compatible with the rights set out in the Bill. <sup>5</sup> Acts of the UK Parliament were not mentioned in the question.

**Seventy eight percent of those answering the relevant question** supported the proposal. (3% said 'no', and 19% said they didn't know.) The most popular view expressed by those who commented was that including such provisions would ensure the Bill is consistent with the [Human Rights Act](#) and the [Scotland Act](#). <sup>6</sup>

## Sections 20-23: Incompatible legislation

**Sections 20-22 of the Bill** give the courts powers to deal with the situation where they find it is impossible to read a piece of legislation in a way that is compatible with the UNCRC requirements.

A court can (depending on the type of legislation in question) make a [strike down declarator under section 20](#) or an [incompatibility declarator under section 21](#).

For **primary legislation**, the proposed distinction in the Bill is between **existing legislation** and **future legislation**. For existing legislation, a **strike down declarator** could be made. For future legislation an **incompatibility declarator** could be made.

For the purpose of distinguishing between existing and future primary legislation, the key date is the date on which the relevant provisions of the Bill (i.e. sections 20 and 21) come into force (should the Bill become law).

**Section 23** sets out [what Ministerial action would be required](#) after a strike down declarator or incompatibility declarator is made.

Separately, [Part 5 of the Bill](#) establishes court procedures by which the lower courts can refer a question to the higher courts for the higher court's decision on legislation's compatibility with the UNCRC requirements. [Part 6 of the Bill](#) also enables the Scottish Ministers to make **remedial regulations** to fix an incompatibility.

## Background

This section of the briefing sets out the background to sections 20-23, before [the individual provisions are considered in more detail](#).

### *The Scottish and UK human rights context*

In the Scottish and UK human rights context, there are currently different legal approaches to legislation which the court has found to be incompatible with Convention Rights:

- Under the [Scotland Act](#), a provision of an Act of the Scottish Parliament is **not law** insofar as the provision is incompatible with Convention rights.<sup>65</sup> In other words, all public authorities, including the courts, must ignore the legislation once it has been found to be incompatible with Convention rights.
- Under the [Human Rights Act](#), courts can make a **declaration of incompatibility** in respect of certain legislation - a formal statement that the provision is incompatible with Convention rights.<sup>66</sup> The legislation must still be applied by public authorities, including the courts, unless and until it has been changed. After a declaration of incompatibility, the UK Parliament may decide to leave the legislation in place.

The influence of both the [Scotland Act](#) and the [Human Rights Act](#) can be seen in Part 4 of the Bill. (For more detail on these Acts, see, for example, the SPICe Briefing entitled [Human Rights in Scotland](#), at p 16.)<sup>16</sup>

### *The Scottish Government's consultation paper*

In its [consultation paper](#), the Scottish Government said that **only declarations of incompatibility** with the UNCRC requirements would be possible for primary legislation (**existing or future**):

“ It would not be open to the Parliament to create new limitations on its own legislative competence: that could only be done by amending provisions of the Scotland Act 1998 that the Parliament cannot modify. It follows that the Bill incorporating the UNCRC could not provide that a provision in an [Act of the Scottish Parliament] (whether an existing [Act] or a future [Act]) is not law so far as it is incompatible with the UNCRC rights.”

Scottish Government, 2019<sup>5</sup>

### *The approach in the Bill*

By the time of the Bill's introduction, the Scottish Government's thinking had shifted on the position in relation to **existing primary legislation**. As noted earlier, [under section 20](#), a power to make strike down declarators is proposed for such legislation.

For **future primary legislation**, the Government's view, as set out in the [Policy Memorandum](#), remains that strike down powers are not possible:

“ Provision requiring future legislation to be compatible with [the] UNCRC would effectively change the power of the Parliament and is, therefore, beyond its current powers.”

Scottish Parliament, 2020<sup>1</sup>

For Part 4, the [Policy Memorandum](#) says the Scottish Government's **preferred approach** would have been to give the courts powers to 'strike down' all provisions of legislation which are incompatible with the UNCRC requirements, **regardless of when that legislation was made**.<sup>1</sup>

Accordingly, Part 4 of the Bill (with its distinction between existing and future primary legislation) represents, not the Scottish Government's ideal policy position, but what it believes is within the current legislative powers available to the Parliament.

### **The provisions in more detail**

This section of the briefing considers sections 20-23 in more depth.

#### *Section 20: Strike down declarators*

**Section 20** would allow a court to strike down certain kinds of legislation if it finds it to be incompatible with the UNCRC requirements.

Primary legislation could only be struck down if enacted **before** the day that section 20 comes into force. Secondary legislation could be struck down whenever it is made.  
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The effect of striking down legislation is that, **from the point it was struck down**, that legislation no longer forms part of Scots law (to the extent of the incompatibility).<sup>68</sup>

Legislation could only be struck down if it was within the legislative competence of the Scottish Parliament to make.<sup>67</sup> However, this includes, for example, a provision of an **Act of the UK Parliament** which covers a policy area devolved to the Scottish Parliament.

Section 20 empowers the court to **suspend the effect of a strike down declarator** "for any period and on any conditions" to allow the incompatibility to be remedied. When deciding whether to suspend in this way, the court must, among other things, consider any adverse effect on people who are not involved in the litigation of any strike down.<sup>69</sup> There is an equivalent power in the [Scotland Act](#) in relation to its strike down regime.<sup>70</sup>

### *Section 21: Incompatibility declarators*

Section 21 allows a court to declare that certain legislation is incompatible with the UNCRC requirements. It remains law unless and until legislation changes that.<sup>71</sup>

Legislation in respect of which an incompatibility declarator could be made is **primary legislation enacted on or after the date section 20 came into force**. This includes Acts of the UK Parliament, as well as Acts of the Scottish Parliament. [As with the equivalent provisions under section 20](#), these Acts must be within the legislative competence of the Scottish Parliament to make.<sup>72</sup>

### *Sections 20 and 21: Which courts can make a declarator?*

Recognising the importance of the courts' powers, a [strike down declarator](#) or an [incompatibility declarator](#) may only be made by:

- The [UK Supreme Court](#).
- The [Court of Session](#). This is the most senior civil court based in Scotland, although its decisions can be appealed to the UK Supreme Court in some circumstances.
- The [High Court of Justiciary](#) ('the High Court') which is Scotland's highest criminal court.<sup>73</sup>

The High Court must **not** be sitting as the criminal trial court hearing a case for the first time when it is exercising the strike down power.<sup>74</sup> So, for example, the High Court can use the power when hearing an appeal. Section 20 has no equivalent restriction on the Court of Session, although some civil cases are heard for the first time in the Court of Session.

## *Section 22: The role of the Lord Advocate and Children's Commissioner*

**Section 22** says that, before making either a [strike down declarator](#) or an [incompatibility declarator](#) the court must give the [Lord Advocate](#), Scotland's chief law officer, and the [Children's Commissioner](#), the opportunity to join the proceedings as a party to the case, in so far as the court proceedings relate to the making of either type of declarator.

The [Lord Advocate](#) is a Minister of the Scottish Government and its principal legal adviser. The [Explanatory Notes to the Bill](#) suggest that the Lord Advocate's role here would involve explaining any wider public interest ramifications (of either type of declarator) of which the court should be aware.<sup>26</sup>

## *Section 23: what the Government must do after a declarator*

**Section 23** sets out what Scottish Ministers must do in the event that a [strike down declarator](#) or an [incompatibility declarator](#) is made by the court in respect of a piece of legislation.

It requires Scottish Ministers, **within six months** of the declarator being made, to:

- publish a report setting out what steps (if any) they intend to take in response to the declarator
- lay a copy of that report before the Scottish Parliament, and
- "seek to make a statement" to Parliament on the contents of that report.

The [Explanatory Notes](#) say the duty to make a statement to Parliament is a qualified one, because the scheduling of parliamentary business is not controlled by the Government.<sup>26</sup>

For comparative purposes, examples of other duties on the Government to make parliamentary statements (following reports required under statute) include [section 9\(7\)](#) of the [Child Poverty \(Scotland\) Act 2017](#) and [section 42\(1\)](#) of the [Climate Change \(Scotland\) Act 2009](#).

## **Consultation responses**

The [consultation](#) asked whether the Bill should contain a regime which would enable rulings to be obtained from the courts on the question of whether a provision in an **Act of the Scottish Parliament** is incompatible with the UNCRC requirements.<sup>5</sup>

**Acts of the UK Parliament** were not referred to directly by the consultation question. There was also no proposal to apply different legal regimes, depending on when the legislation at issue was enacted.

**Ninety one percent of the respondents** who answered the consultation question supported such a regime enabling court-based rulings, with 9% against. The most popular view expressed in response to this question was **the need to have strike down powers**, with declarations of incompatibility (discussed in the consultation paper) regarded as 'the weaker alternative'.<sup>6</sup>

In the responses to the consultation there was repeated questioning of the legal basis for the Scottish Government's original position, <sup>6</sup> as stated in the [consultation paper](#). As noted earlier, this said that only declarations of incompatibility with the UNCRC requirements would be possible for primary legislation.

## Part 5: 'UNCRC compatibility issues' and 'compatibility questions'

Part 5 sets out a system to allow the courts to determine:

- whether legislation is compliant with the UNCRC requirements
- whether a public authority has complied with [its duty under section 6](#) in relation to the UNCRC requirements.

The procedures set out in Part 5 may be a precursor to the use of [the courts' powers relating to incompatible legislation in Part 4](#) or [the judicial remedies for the breach of the duty on public authorities provided for in Part 2](#).

Part 5 proposes a distinction between issues of compatibility with the UNCRC requirements arising in criminal proceedings (a **UNCRC compatibility issue**) and those arising in civil proceedings (a **compatibility question**). Part 5 sets out separate court procedures to determine each. Part 5 is modelled on the equivalent system relating to Convention rights (which uses similar, but distinct, terminology for the two types of issue).

The proposed court procedure for **UNCRC compatibility issues** is set out in **section 25** and would amend the [Criminal Procedure \(Scotland\) Act 1995](#). The proposed court procedure for **compatibility questions** is in the remainder of Part 5.

### Policy aims

One **policy aim for Part 5** is to allow rulings on novel issues by the higher courts, resulting in the development of case law which can be followed by the lower courts. <sup>1</sup> This is important because the issues faced by the courts might be technically difficult (in terms of the law which must be applied) and/or of general public importance.

Like the equivalent system for Convention rights, Part 5 offers a system to resolve an issue which aims to respect the existing court hierarchy. This is important because the topics covered in the bullet points above can arise at **any level of court or tribunal in Scotland**.

### The role of the UK Supreme Court

As discussed earlier, Part 5 proposes two separate referral procedures, one for UNCRC compatibility issues (which arise in criminal proceedings) and one for compatibility questions (which arise in civil proceedings.)

For the most part, the two procedures proposed would use the existing courts associated with the criminal court system (for UNCRC compatibility issues) and the existing courts associated the civil court system (for compatibility questions).

However, as with the equivalent procedure for Convention rights, there is a role for the [UK Supreme Court](#) (based in London) on issues of compatibility arising in criminal proceedings. This is noteworthy because the [High Court of Justiciary](#) in Scotland is generally the **final court of appeal** on issues of Scots criminal law. However, as with the equivalent procedure for Convention rights, the proposed procedure aims to protect the High Court's status in this regard.

Specifically, **section 25 of the Bill** says that if a UNCRC compatibility issue (i.e. one arising in criminal proceedings) is referred to the [UK Supreme Court](#), the Supreme Court may only deal with the UNCRC compatibility issue. It must return (**remit**) the remainder of the case, which relates to Scots criminal law, to the [High Court](#) in Scotland for a decision.

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## The role of the Lord Advocate

In Part 5, while there is a key role for the courts, the [Lord Advocate](#), Scotland's chief law officer, also has significant powers. For example, for a compatibility question (i.e. one arising in civil proceedings) he or she has the power to **require** a Scottish court or tribunal to refer a compatibility question directly to the [UK Supreme Court](#) (the highest court which currently deals with Scottish civil law issues).

As another example, the Lord Advocate also has the power to **begin court proceedings** to determine a compatibility question. He or she also has the **power to intervene** (i.e. make representations) in ongoing court proceedings on a compatibility question, a power also available to the [Children's Commissioner](#).

For a UNCRC compatibility issue (i.e. one arising in criminal proceedings) the Lord Advocate has the power to require the criminal court to refer the case to the [High Court](#) or the [UK Supreme Court](#) (depending on the circumstances) if he or she is party to that case.

## Consultation responses

[As noted earlier](#), the [consultation](#) asked a general question whether the Bill should contain a regime which would enable rulings to be obtained from the courts on the question of whether legislation is incompatible with the UNCRC requirements.<sup>5</sup> The question was framed broadly enough to include part of what is now in Part 5 of the Bill, as well as [Part 4](#).

There was strong support for this proposal.<sup>6</sup> However, written comments provided in response [tended to focus on what is now in Part 4 of the Bill](#).



## Part 6: Remedial regulations

Part 6 of the Bill would empower the Scottish Government to change the law, by regulations, to fix an incompatibility (or potential incompatibility) with the UNCRC requirements (as set out in section 1).

Part 6 sets out two processes for making such regulations. (These are not to be confused with the two court procedures [set out in Part 5](#)). Part 6 sets out a procedure that would normally be followed ([section 33](#)) and an alternative process, when there is a perceived need to act more urgently than the normal process would allow ([section 34](#)).

Part 6 of the Bill contains powers similar to those remedial powers available to Scottish Ministers in Part 6 of the [Convention Rights \(Compliance\)\(Scotland\) Act 2001](#). These apply in respect of incompatibilities (or potential incompatibilities) with Convention rights.

The Scottish Government's [consultation](#) referred to the regime in the 2001 Act, but it did not ask a specific question on possible remedial powers for Ministers in respect of the UNCRC requirements.<sup>5</sup>

### Section 33: the normal procedure

Before using the powers in **section 33**, the Government must be satisfied that there are compelling reasons for making remedial regulations as distinct from taking any other course of action.<sup>76</sup>

Section 33 says remedial regulations under section 33 are subject to the Parliament's [affirmative procedure](#), meaning regulations would not be able to be made until the Parliament approves a draft of them. Section 33 provides for additional procedural requirements, beyond those of the usual affirmative procedure. In particular, a public consultation process by the Government is also required.

### Section 34: the urgent procedure

Regulations would be able to be made under **section 34** where it appears to Scottish Ministers that, for reasons of urgency, it is necessary to make regulations without following the section 33 procedure.

Under the section 34 process, **remedial regulations could be made and come into force immediately**. However, they will cease to have effect if the Scottish Parliament has not approved them by resolution **within 120 days**.

The section 34 process also requires consultation on the regulations and allows for the possibility of their being changed, or replaced, within that period.

# Costs

The Financial Memorandum to the Bill focuses on the implementation costs to: <sup>77</sup>

- Empower children to claim their rights

This would include children's rights awareness-raising and participation with children, young people and their families. There will also be a social marketing campaign to raise awareness and support for children's rights.

Over three years, the estimated costs are £1,250,000.

- Embed children's rights in public services

The Scottish Government is providing funding to help support the public sector deliver on respecting, protecting and fulfilling children's rights. The fund will be used in capacity-building and awareness raising activities with practitioners in public services in Scotland. It will provide intensive support to senior leaders in public services to take proactive steps to embed children's rights in their organisations and communities.

Over three years, the estimated costs are £835,000.

Therefore, the total estimated implementation costs of this Bill are £2,085,000.

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