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# Reconsideration Stage: What happens when the Supreme Court decides a Bill is outside the Parliament's powers?

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This short briefing considers the procedure under which the Parliament may reconsider a Bill passed to address legislative competence problems. The briefing also considers the Supreme Court judgments on the legislative competence of the Scottish Parliament to pass the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill and the European Charter of Local Self-Government (Incorporation) (Scotland) Bill.



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# Summary

The Scottish Parliament passed the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill and the European Charter of Local Self-Government (Incorporation) (Scotland) Bill on the 16 March 2021 and 23 March 2021, respectively.<sup>1 2</sup> Both Bills were subsequently referred to the Supreme Court by the Attorney General and the Advocate General for Scotland under section 33(1) of the Scotland Act 1998.<sup>3</sup> The Supreme Court handed down its judgment on 06 October 2021 that certain provisions in each of the Bills would be outside the legislative competence of the Parliament.<sup>3</sup>

On 24 May 2022, the then Deputy First Minister, John Swinney MSP, announced in the Parliament that both Bills would return to the Parliament for reconsideration.<sup>4</sup> The Scottish Parliament has never held Reconsideration Stage proceedings before.

This briefing focusses on the procedure for reconsidering a Bill in the Parliament after the Supreme Court rules that the Bill (or any part of the Bill) would be outside the legislative competence of the Parliament. The briefing also considers the extent to which the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill and the European Charter of Local Self-Government (Incorporation) (Scotland) Bill may be amended if motions to reconsider the Bills are agreed to. An expanded briefing on Reconsideration Stage, which provides background on all the circumstances under which a Bill may be eligible for reconsideration, can be found on the [Scottish Parliament Digital Hub](#).

# From Passing a Bill to Reconsideration Stage

In most circumstances, a Bill is introduced to the Scottish Parliament and progresses through the legislative stages as provided for by [section 36 of the Scotland Act 1998](#) and the [Standing Orders of the Scottish Parliament](#). Each Bill passed by the Parliament is then subject to a four week period where it may be legally challenged by the [Advocate General](#), the [Lord Advocate](#), or the [Attorney General](#) ("the Law Officers"). A legal challenge by any of the Law Officers takes the form of a Bill reference to the Supreme Court.<sup>5</sup> The Secretary of State has a separate power to make an order preventing the Bill from progressing to Royal Assent.<sup>6</sup>

The four week period after the passing of a Bill is one mechanism that is intended to prevent unlawful legislation from reaching the statute book and ensure the Scottish Parliament is not legislating beyond its competence.<sup>5</sup> If the four weeks pass with no statutory challenge to the Bill, it may be submitted for Royal Assent and become an Act of the Scottish Parliament.<sup>6</sup>

If such a challenge, by the Law Officers, is successful in the Supreme Court, or the Secretary of State makes an order, the Parliament may reconsider the Bill in a [Reconsideration Stage](#). [Section 36 of the Scotland Act 1998](#) provides for the Parliament's Standing Orders to allow for a Reconsideration Stage after a Bill passing in each of the following circumstances:

- The Supreme Court decides a reference under [section 33](#) (of the Scotland Act 1998) that the Bill (or any provisions of the Bill) would not be within the legislative competence of the Parliament;
- The Supreme Court decides a reference under [section 32A](#) that the Bill (or any provisions of the Bill) relates to a "[protected subject-matter](#)" requiring a two-thirds majority in the Parliament to pass the legislation;
- The Supreme Court decides that the Bill (or any provision of the Bill) does not relate to a "protected subject-matter" in a reference under [section 32A](#) after the rejection of a Bill where the Presiding Officer has stated that the Bill does relate to a protected subject-matter; or
- The Secretary of State makes an order under [section 35](#) to prevent the Presiding Officer from submitting the Bill for Royal Assent because the Bill contains provisions:
  - “ (a) which the Secretary of State has reasonable grounds to believe would be incompatible with any international obligations or the interests of defence or national security, or (b) which make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters”

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If a reference is disposed of (i.e. closed) by the Supreme Court and decided as *not* relating to protected subject-matter or decided as within the legislative competence of the

Parliament, the Bill may progress towards Royal Assent. The Bill is still subject to the potential for an additional order by the Secretary of State (under section 35) within four weeks of the reference being disposed of by the Supreme Court.<sup>6</sup> If the Secretary of State does make an order under section 35, it may return to the Parliament in a Reconsideration Stage.<sup>6</sup>

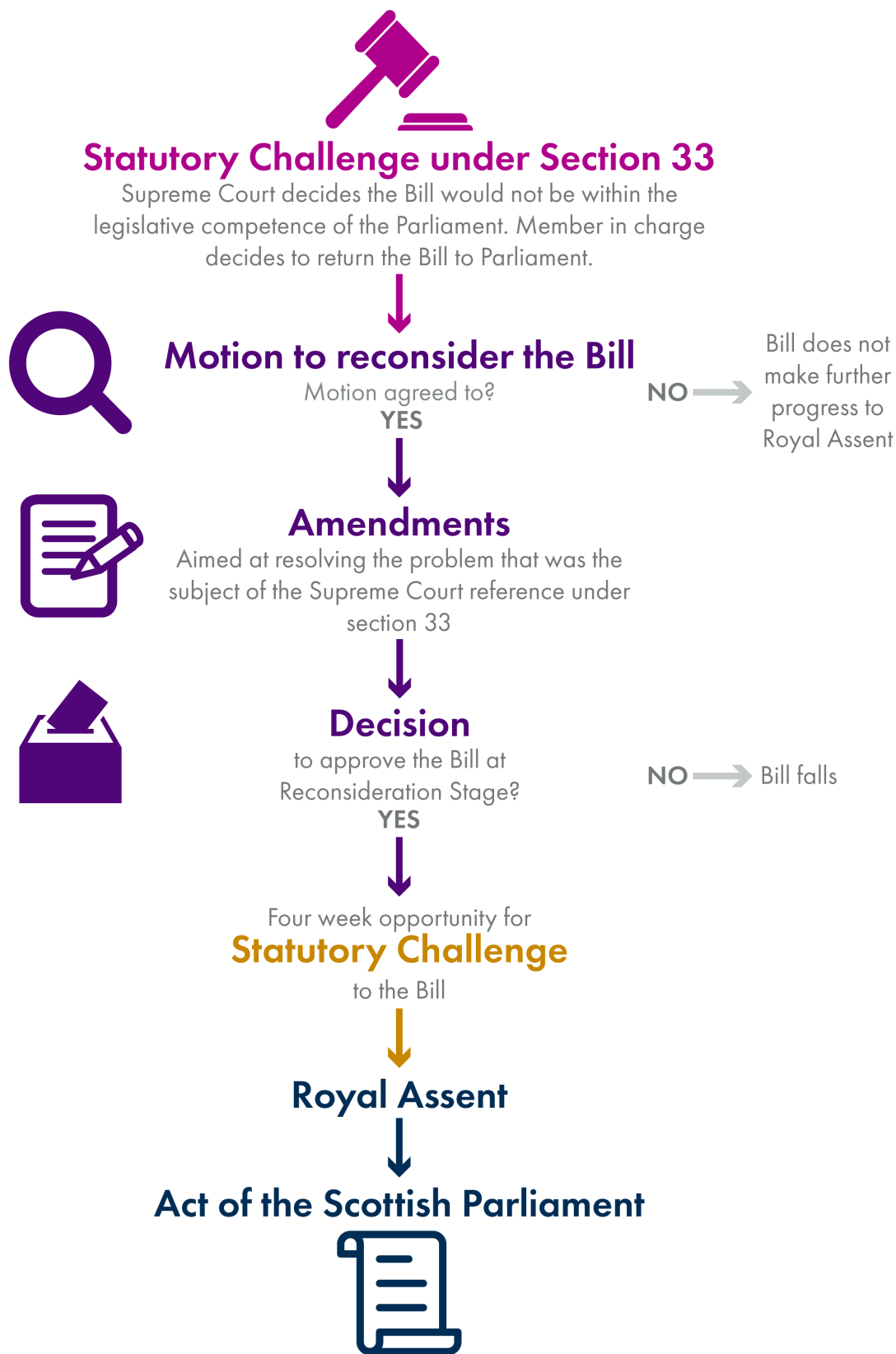
SPICe has produced an expanded briefing on Reconsideration Stage in each of the above circumstances (see [Scottish Parliament Digital Hub](#)).

# Reconsideration Stage

This briefing focuses on the purpose of, and procedure for, reconsidering a Bill following a decision by the Supreme Court that the Bill (or part of the Bill) would be outside the legislative competence of the Parliament.

[Section 33 of the Scotland Act 1998](#) provides for consideration of Bills by the Supreme Court on questions of legislative competence. SPICe has produced an [infographic](#) summarising the procedure for reconsidering Bills passed by the Parliament following a reference to the Supreme Court under section 33 of the Scotland Act 1998.

# Procedure for Reconsidering Bills Passed by the Parliament



Source: Scottish Parliament Information Centre

SPICe, adapted from the Scotland Act 1998, the Standing Orders of the Scottish Parliament, and the Guidance on the Standing Orders.

## Motion to Reconsider the Bill

[Section 36\(4\)\(a\) of the Scotland Act 1998](#) provides that reconsideration of a Bill can take place if the Supreme Court has decided that the Bill (or any part of the Bill) would be outside the legislative competence of the Parliament.<sup>6</sup> The procedures for the reconsideration of a Bill passed (and then returned to Parliament) are outlined in [Rule 9.9 of the Standing Orders of the Scottish Parliament](#).<sup>7</sup>

To initiate Reconsideration Stage proceedings, a Motion to reconsider the Bill must be lodged under Rule 9.9.2, and agreed to by the Parliament.<sup>7</sup> Rule 9.9.2 allows for the Member in charge of the Bill to "*by motion propose that the Parliament resolve to reconsider the Bill*" if the Supreme Court has decided that the Bill (or any provision in the Bill) would be outside the legislative competence of the Parliament.<sup>7</sup> The Parliament cannot move to reconsider or withdraw the Bill of its own accord. The Member in charge of the Bill is the only Member who can initiate Reconsideration Stage proceedings in the Parliament.<sup>7</sup>

There is no requirement in the Standing Orders to debate the Motion for reconsideration. However, there are also no provisions in the Standing Orders which preclude a debate on the Motion for reconsideration from taking place. If the Motion is agreed to, the Guidance on Public Bills indicates that the Parliamentary Bureau will propose in a Business Motion a time for the Reconsideration Stage of the Bill at a meeting of the Parliament.<sup>8</sup>

The Standing Orders do not set out a formal role or requirement for Committees of the Parliament to conduct scrutiny of the Scottish Government's (or the designated Member's) proposals for reconsideration of the Bill. Again, there are also no provisions in the Scotland Act 1998 or the Standing Orders which would preclude Committees from considering the proposals for amendments after a Motion to reconsider the Bill has been agreed to.

## Admissibility of Amendments

If the Motion for reconsideration is agreed to by the Parliament, the Bill may enter Reconsideration Stage proceedings. Reconsideration Stage proceedings are taken at a meeting of the Parliament.<sup>7</sup> The Standing Orders of the Scottish Parliament set out how the amendments to the relevant provisions in the Bill may be made and how the final proceedings for approval of the Bill should take place.

Rule 9.9.4 sets out the procedure for amendments at Reconsideration Stage. For Bills being reconsidered by the Parliament, there is an additional admissibility criterion which specifies amendments are only admissible if they are aimed at addressing the legislative competence problems that were the subject of the Supreme Court reference under section 33.<sup>7</sup>

The Guidance on Public Bills indicates that the Supreme Court judgment will be used by the clerks to guide the admissibility of amendments.<sup>8</sup> The Guidance on Public Bills also sets out additional details on amendments at Reconsideration Stage and states:



“ Amendments are worded by reference to the “As Passed” version of the Bill. As at Stage 3, amendments are disposed of in the order in which they relate to the Bill, unless the Parliament decides, on a Bureau motion, to follow a different order (Rule 9.9.4). There is no selection of amendments at Reconsideration Stage, so all admissible amendments lodged may be moved.”

The Scottish Parliament, 2022<sup>8</sup>

The admissibility criterion for amendments at Reconsideration Stage is in addition to the usual admissibility criteria for amendments to all Bills in Rule 9.10.5. <sup>7</sup> Rule 9.10.5 states:

“ An amendment is admissible unless— (a) it is not in proper form; (b) it is not relevant to the Bill or the provisions of the Bill which it would amend; (c) it is inconsistent with the general principles of the Bill as agreed by the Parliament; or (d) it is inconsistent with a decision already taken at the Stage at which the amendment is proposed.”

The Scottish Parliament, 2023<sup>7</sup>

The Guidance on Public Bills ([paragraphs 4.9 to 4.27](#)) provides further detail on what is meant by the rules guiding admissibility of amendments.

### **Summary: Amendments at Reconsideration Stage**

- Only amendments aimed at resolving the problems that were the subject of the Supreme Court reference under section 33 are admissible.
- There is no selection of amendments at Reconsideration Stage. All admissible amendments tabled may be moved.

## **Proceedings at Reconsideration Stage**

After any amendments have been disposed of and before the Parliament decides whether to approve the Bill, the Presiding Officer must make a further statement on whether any of the provisions relate to protected subject-matter as set out in [section 31\(4\) of the Scotland Act 1998](#) and Rule 9.8.5BA of the Standing Orders. <sup>7</sup> Where a Bill subject to a section 33 challenge is amended during Reconsideration Stage proceedings, [section 36\(5\) of the Scotland Act 1998](#) requires that a final stage at which the Bill can be approved or rejected is held.

If the Bill has been amended at Reconsideration Stage to include provisions that would require [Crown consent](#) (i.e., the provisions would affect the prerogative, private interests or hereditary revenues of The King, the Prince and Steward of Scotland, or Duke of Cornwall), consent for those provisions is signified during debate on whether to approve the Bill. <sup>7</sup>

## **Scope for Further Reconsideration**

Once a Bill has been approved at Reconsideration Stage, it is subject to a four week

period during which the Law Officers or Secretary of State may make a legal challenge to the Bill under section 33 and section 35 of the Scotland Act 1998, respectively.

If there is no legal challenge within the four week period, the Bill may be submitted for Royal Assent by the Presiding Officer and become an Act of the Scottish Parliament.

# Supreme Court Judgment on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill and the European Charter of Local Self-Government (Incorporation) (Scotland) Bill

The Scottish Parliament passed the [United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill](#) ("the UNCRC Bill") and the [European Charter of Local Self-Government \(Incorporation\) \(Scotland\) Bill](#) ("the ECLSG Bill") on the 16 March 2021 and 23 March 2021, respectively. The UNCRC Bill<sup>i</sup> and the ECLSG Bill<sup>ii</sup> are intended to incorporate treaties to which the UK is a signatory into Scots law. These treaties are the [United Nations Convention on the Rights of the Child](#) ("the UNCRC") and the [European Charter of Local Self-Government](#) ("the ECLSG").

Both Bills were subsequently referred to the Supreme Court by the Attorney General and the Advocate General for Scotland under section 33(1) of the Scotland Act.<sup>3</sup> The Supreme Court handed down its judgment on 06 October 2021. It concluded that certain provisions in each of the Bills would be outside the legislative competence of the Parliament.<sup>3</sup> The Supreme Court Summary of the judgment states:

“ The Supreme Court unanimously decides that sections 6, 19(2)(a)(ii), 20(10)(a)(ii) and 21(5)(b)(ii) of the UNCRC Bill and sections 4(1A) and 5(1) of the ECLSG Bill would be outside the legislative competence of the Scottish Parliament. This means that the Bills will return to the Scottish Parliament so that these issues can receive further consideration.”

The Supreme Court, 2021<sup>3</sup>

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

On 24 May 2022, the then Deputy First Minister, John Swinney MSP, announced in the Parliament that the Scottish Government intended to bring the UNCRC Bill back to the Parliament for a Reconsideration Stage.<sup>4</sup> The Scottish Parliament has never held Reconsideration Stage proceedings before.

In line with [Rule 9.9.4 of the Standing Orders of the Parliament](#), any amendments to the UNCRC Bill at Reconsideration Stage must be for the purpose of addressing the problems with legislative competence in the provisions identified in the Supreme Court judgment (see [Admissibility of Amendments](#)). Some detail on the necessary changes to the UNCRC

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i SPICe produced a [briefing on the Bill, as introduced](#), and an [update blog before Stage 3](#).

ii SPICe produced a [briefing on the Bill, as introduced](#), and an [update blog before Stage 3](#).

Bill were first provided in the Deputy First Minister's statement to the Parliament on the 24 May 2022. Deputy First Minister John Swinney MSP stated:

“ To address the judgment in relation to section 6 of the UNCRC bill, it is clear that we need to expressly limit the compatibility duty to devolved functions and devolved bodies. We also need to include in the bill a provision that is equivalent to section 6(2) of the Human Rights Act 1998 so that public authorities cannot be found to have acted incompatibly where the underlying primary legislation cannot be read in a compatible way. To address the judgment on the judicial remedies in both bills, we need to remove UK acts from the application of the interpretative obligation, the strike-down power and the incompatibility declarator power.”

The Scottish Parliament Official Report, 2022<sup>4</sup>

The announcement also noted that the Scottish Government would begin a short period of engagement with stakeholders. Deputy First Minister John Swinney MSP stated:

“ There will now be three weeks of engagement with key stakeholders, including with children and young people and COSLA. For the UNCRC bill, the purpose of that engagement will be to ensure that those who have lobbied passionately for it understand the changes that are being made and why. It will also help us to understand any concerns that need to be aired during Reconsideration Stage... Following that engagement, I will update the relevant parliamentary committees before amendments are lodged. We will liaise with the parliamentary authorities about the timescale for Reconsideration Stage, recognising that we need to make sufficient time to engage with the Parliament on the substance of our proposals.”

The Scottish Parliament Official Report, 2022<sup>4</sup>

In [correspondence from 16 March 2023 to the Convenor of the Equalities, Human Rights and Civil Justice Committee](#), the then Minister for Children and Young People Clare Haughey MSP indicated that the Scottish Government had been engaging with the UK Government on the problems with the Bill. <sup>9</sup> This letter also stated:

“ We have made clear to the UK Government that we intend to move towards reconsideration of the Bill soon. We have asked that if they have any new and material concerns about these revised amendments, they advise us of this within the next few weeks.”

Letter from the Minister for Children and Young People to the Convenor of the Equalities, Human Rights and Civil Justice Committee, 16 March 2023, 2023<sup>9</sup>

Following the appointment of new Scottish Ministers on 30 March 2023, First Minister Humza Yousaf MSP [made a statement to Parliament on 18 April 2023](#) and released a document containing the [Scottish Government's priorities for Scotland](#). This document includes the commitment to make "*Scotland the first UK nation to incorporate the UN Convention on the Rights of the Child into domestic law*" by 2026. <sup>10</sup> The Programme for Government 2023-24 also indicated that the Scottish Government will:

“ ...invite the Scottish Parliament to bring back the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill for reconsideration stage, to deliver legislation that protects and enhances a fuller range of human rights within the limits of devolved competence – improving the lives of those most marginalised and vulnerable in our society”

The Scottish Government, 2023<sup>11</sup>

## Statement by Cabinet Secretary for Social Justice on Reconsideration of the Bill

The Cabinet Secretary for Social Justice Shirley-Anne Somerville MSP made a statement to the Parliament on 27 June 2023 which provided an update on the proposed reconsideration of the Bill.<sup>12</sup> The statement set out that the key issue with the Bill referred to the Supreme Court was on how the duty to act compatibly with the UNCRC would apply in devolved areas when a public authority is acting under powers conferred by a UK Act of Parliament.<sup>12</sup> The Cabinet Secretary stated:

“ In drafting amendments to the compatibility duty, we have tried to balance three important considerations: protecting children’s rights to the maximum effect possible; minimising the risk of another Supreme Court referral; and making the law as accessible as possible for users... With regard to the coverage for children’s rights, it is clear from the Supreme Court judgment that the bill cannot require public authorities to act compatibly with the UNCRC when they are delivering duties and powers in a UK act in devolved areas and that act requires them to act incompatibly. However, our objective has been to ensure that the compatibility duty should apply both when public authorities are delivering duties under a UK act in a devolved area that requires them to act compatibly with the UNCRC and when they are delivering duties under a UK act in a devolved area that gives them some discretion to act compatibly.”

The Scottish Parliament, 2023<sup>12</sup>

In the statement, the Cabinet Secretary proposed that the compatibility duty should apply only when public authorities are delivering duties under powers in an Act of the Scottish Parliament. In the Scottish Government’s view, this option minimises the risk of a referral to the Supreme Court following a Reconsideration Stage and reduces complexity for users of the Bill.<sup>12</sup> The Cabinet Secretary stated:

“ That option is for the compatibility duty to apply only when public authorities are delivering duties under powers in an act of the Scottish Parliament. That will, of course, entail a loss of coverage of the compatibility duty in respect of certain laws that relate to children’s rights. There are many existing acts of the UK Parliament that set out duties that impact on children and young people in devolved areas, but I have time to give but two examples here. The compatibility duty would not apply to services being delivered under the Education (Scotland) Act 1980. That covers the provision of education, including standards, special needs provision, and free school books and equipment. Another example of where the compatibility duty will not apply is when services are being delivered under the Children (Scotland) Act 1995. That will include, for example, local authorities’ duties in relation to looked-after children and personal relations with their parents and brothers and sisters.”

The Scottish Parliament, 2023<sup>12</sup>

The Cabinet Secretary also indicated the Scottish Government's next steps before lodging a motion to reconsider the Bill, and stated:

“ I will therefore be writing to the Secretary of State for Scotland to confirm how we will amend the UNCRC bill and to urge the UK Government to bring forward its own legislation to incorporate the UNCRC... In the meantime, I will now make arrangements to begin the process of parliamentary consideration of a revised United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. The process that is agreed with the parliamentary authorities for the bill means that the next step is to confirm the admissibility of our proposed amendments with them. I will then lodge a motion so that Parliament can confirm its willingness to reconsider the bill. We are confident that our proposals for amending will be within our legislative competence and will deliver a clear, coherent and workable bill that provides valuable protections for the rights of children in Scotland. I look forward to presenting the amendments to Parliament as soon as possible after the summer recess.”

The Scottish Parliament, 2023<sup>12</sup>

## **European Charter of Local Self-Government (Incorporation) (Scotland) Bill**

The ECLSG Bill was a Member's Bill introduced by Andy Wightman MSP (who is no longer in Parliament) on 5 May 2020. Mark Ruskell MSP was designated as the additional member in charge of the Bill. <sup>2</sup> The Deputy First Minister announced on 24 May 2022 that the Scottish Government would support Mark Ruskell MSP, as designated Member, to take forward the ECLSG Bill to a Reconsideration Stage in the Parliament. <sup>4</sup> The Programme for Government 2023-24 reaffirmed this announcement and stated:

“ We intend to bring back the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (“the UNCRC Bill”) for Reconsideration Stage, and support Mark Ruskell MSP in doing the same for the European Charter of Local Self-Government (Incorporation) (Scotland) Bill.”

The Scottish Government, 2023<sup>11</sup>

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