



FACULTY OF ADVOCATES

Response from the Faculty of Advocates

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

The Faculty of Advocates is pleased to respond to the consultation on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. The Faculty refers to their detailed comments during the Scottish Government consultation on incorporating the United Nations Convention on the Rights of the Child (“UNCRC”) into the domestic law of Scotland. The present response focuses on the current consultation questions.

Part 1

Question 1 – Will the Bill make it easier for children to access their rights?

The incorporation of UNCRC in this Bill should make it easier for children to access their rights, but the financial consequences are potentially very significant and likely to be underestimated in the Financial Memorandum.

As was set out in the Faculty Response to the consultation, the UNCRC is an aspirational document which is not easily translatable into specific rights enshrined in legislation. The Convention provides for very general and broadly stated rights to education, housing, health care, standard of living, protection from abuse and injury, and many other rights. The incorporation of the UNCRC is proceeding on what might be called a maximalist approach. This means that there are very likely to be many matters of interpretation which arise, which have the potential to generate a considerable quantity of litigation, with significant cost implications, both in terms of the litigation itself, and in terms of the resulting practical consequences.

By way of example, if as a result of enhanced rights for children under the proposed Act, a local authority is obliged to accede to a placing request for a child in an educational establishment in England, the cost of attendance at that establishment may run to in excess of £100,000 per year,

leading to a cost to that local authority of many hundreds of thousands of pounds over the school career of that child alone.

We do not consider that the £2 million budget set out in the Financial Memorandum is realistic. The budget does not take into account the cost to public authorities of fulfilling their obligations in terms of children accessing their rights under the Bill. The budget does not factor in the cost of litigation to public authorities, the Scottish Legal Aid Board and the Children's Commissioner.

There are potentially much broader consequences than flow from the European Convention on Human Rights, as a result of the breadth of the rights which are set out in the UNCRC. The Bill expressly disavows any modification to the Human Rights Act 1998, but this does not clarify that, in the event of conflict between ECHR and UNCRC, the former should prevail.

Question 2 – What do you think about the ability to take public authorities to court to enforce children's rights in Scotland?

This is primarily an issue of policy, therefore the Faculty does not express any view on making provision to take public authorities to court to enforce children's rights in Scotland. There are certain aspects of the proposed arrangements, however, that cause some concern as to the way they will work in practice, and the interplay with existing provisions, particularly those for judicial review.

The extension of time limits in section 7, to disregard periods when an applicant is under the age of 18 is likely to be impractical at a number of levels. Proceedings to be brought against a public authority by way of judicial review should generally be raised within 3 months, with an extension allowed by the court if it is equitable to do so in the circumstances of the case. The three-month time limit was introduced by the Courts Reform (Scotland) Act 2014 to avoid delays in challenges being brought, where it was being claimed that an act or decision was unlawful. Public authorities have to make immediate and difficult decisions regarding the care or education of children, at specific points in time, often when children are very young, and which will be acted upon at that time. If the challenge is delayed until a child attains 18 then the issue is likely to be academic. The requirement for review in the particular case will have passed. The review is likely to be too late to correct faulty decision-making for children generally. By the time the action was raised, the applicant would no longer be a child, as defined by UNCRC, and no longer entitled to assert rights under the Convention. And if the review is to have any effect, it will be contrary to the interests of public bodies in good administration, as they may have to go back and review large numbers of decisions taken in the interim. This was the basis of the former common law plea of *mora* which

prevented stale claims being raised in judicial review proceedings (e.g. *Mackay-Ludgate v Lord Advocate* 2002 SCLR 109, *Crossan v South Lanarkshire Council* 2006 SLT 441). The question does arise as to whether the public authority would still have the right to found on such a plea, regardless of the terms of the Bill.

Extending the period of one year for decisions to be challenged, where that would be other than by resort to judicial review, also runs contrary to the need to avoid delay, particularly when dealing with acts or decisions that affect a child or children. This extended time limit will place an onerous burden on public authorities in terms of record keeping, and ensuring all material evidence required in support of the decisions they make is preserved. The equivalent time limit for claims under section 7 of the Human Rights Act 1998 is one year or such longer period as the court or tribunal considers equitable having regard to all the circumstances. The Supreme Court has refused to extend the one-year time limit for a child in circumstances where any damages awarded were unlikely to be substantial (*A v Essex County Council* [2011] 1 AC 280).

Were the time limits to remain 3 months and 1 year, with discretion to extend, with an express requirement to have regard to the fact that the applicant is under the age of 18 when deciding whether a late claim could be made, that would permit the court to balance all the relevant considerations, with a particular focus on the rights and interests of children.

The proposed restriction on proceedings in respect of judicial acts in section 9, includes within it judicial acts of a tribunal. It would be beneficial to have clarity on whether this includes Children's Hearings within the definition of tribunal.

We consider that the proposed addition to the powers of the Children's Commissioner, suggested in section 10, will be a useful and beneficial extension.

Question 3 – What more could the Bill do to make children's rights stronger in Scotland?

We have nothing to add in response to this question.

Question 4 – Additional resources

The Faculty will be pleased to help children and young people access their rights and to advise public authorities and other organisations on the effects of the Bill. The Scottish Legal Aid Board is likely to require funding for litigation arising as a result of the Bill.

Part 2

Question 1 – Are there any relevant equalities and human rights issues related to this Bill, or potential barriers to rights, that you think we should look at?

The broad nature of the rights which are incorporated in terms of this Bill may result in conflict with rights under other legislation. Courts will be required to balance competing rights. In the event of conflict with rights under ECHR, the ECHR rights will have to prevail. This will present challenges, but these should be accommodated by courts. It will be much more difficult if non-lawyers are presented with conflicting rights.

Reconciling rights focusing on children which are framed in a very broad manner can be difficult. This was demonstrated in the difficulties encountered in implementing the named person scheme, which was impossible to reconcile with the data rights of all concerned under Article 8 of the European Convention on Human Rights. This would have put teachers, headteachers, and others working with children in a very difficult position. Some consideration requires to be given to how non-lawyers will be assisted when there is a dilemma of this nature.

Question 2 – What are your views on the provisions in the Bill that allow the courts to strike down legislation judged to be incompatible with the UNCRC?

These are largely modelled on the provisions of the Human Rights Act 1998 and the Scotland Act 1998. We are now familiar with the way such provisions work. We do however have concerns about working with two sets of provisions, one relating to ECHR and the other to UNCRC, in the event that legislation promotes rights under one Convention but is adverse to rights under the other.

Question 3 – What are your views on the Children’s Rights Scheme and the requirement on public authorities to report?

The Scheme appears to be a means of promoting the policy objective of the Bill, rather than a matter on which the Faculty can offer comment.

Question 4 – Is there anything else you want to tell us about the Bill?

We have nothing to add.

Part 3

Question 1 – Was this views submission tool easy to use?

It would have been helpful to have a separate list of questions, rather than having to complete the answers to each part before seeing the questions in the next part.

Question 2 – Do you think this Call for Views submission tool provides a good way for you to get involved in the work of Parliament?

We would have submitted views regardless of the mechanism offered for responding.