

## INCORPORATING THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD INTO SCOTS LAW

### TARGETED ENGAGEMENT ON APPROACH TO ADDRESSING THE SUPREME COURT JUDGMENT ON THE UNCRC (INCORPORATION) (SCOTLAND) BILL

**JustRight Scotland (JRS)** is Scotland's legal centre for justice and human rights. We use the law to defend and extend people's rights. We operate 4 national centres of legal excellence providing direct legal representation, legal outreach, and legal education: (i) the Scottish Refugee & Migrant Centre; (ii) the Scottish Women's Rights Centre; (iii) the Scottish Anti-Trafficking & Exploitation Centre; and (iv) the Scottish Just Law Centre. You can find out more about us here: [www.justrightscotland.org.uk](http://www.justrightscotland.org.uk).

#### Introduction

We are responding to this targeted engagement by drawing on our lawyers' longstanding practical experience and expertise in providing legal information, advice and representation to children and young people. We represent young people across a number of areas of UK and Scots law, including immigration and asylum, human trafficking, women's rights and the rights of children in care.

Following the announcement from the Deputy First Minister (DFM) on the proposed next steps for the UNCRC (Incorporation) (Scotland) Bill, and as part of planning for Parliamentary Reconsideration Stage, JRS has been asked to respond to 4 questions to test views on the impact of the amendment on the policy objectives of the UNCRC Bill and identify any issues that we foresee as a result of these fixes.

#### JRS Response

***I. Do you consider that these fixes would minimise the impact on the policy objectives of the UNCRC Bill?***

Yes. We welcome the amendment to section 6 to specifically target devolved functions. We also welcome the amendments to sections 19-21 as they relate to the interpretative and remedial provisions of the Bill. In our view, the Bill would still ensure that the rights contained in the UNCRC are justiciable in the sense that actions of public bodies can be held to account, and that legislation which contravenes the UNCRC can be challenged within the limits of the devolution settlement.

***II. Are there any issues you foresee in operating a refined compatibility duty?***

We are aware that the distinction between reserved and devolved functions is complex, and many public bodies work across both areas simultaneously, often as

regards a single child. This is a matter which relates to the enforcement of the Bill against actions of public bodies.

JustRight Scotland works with refugee and migrant children and young people, and decisions and actions made by public bodies about these children will invariably straddle both devolved and reserved matters. For example:

- Human trafficking – this is an area which primarily relates to adult and child safeguarding, and criminal justice, which are all devolved functions. However, the means by which victims of trafficking are identified in Scotland is through the National Referral Mechanism (NRM), which is a UK wide framework where decisions are made from within the Home Office (although there is a devolved NRM pilot ongoing). The Human Trafficking & Exploitation (Scotland) Act 2015 expressly states that the Scottish Ministers retain the ability to make regulations about the substance and procedure of how victims are identified. However, the Nationality & Borders Act 2022 also makes provisions for how migrant victims who are in the asylum process are to be identified, including, we assume, in Scotland. This is an area where decisions and actions of public bodies in Scotland, e.g. Scottish local authorities, may well be questioned as to whether they are reserved or devolved functions. Our view is that the identification, support and protection of victims of trafficking, regardless of nationality, ought to be devolved functions.
- National Transfer Scheme – this is a scheme whereby unaccompanied asylum-seeking children are transferred from one local authority to another in the UK in order to be looked after while their asylum claim is processed. The UK Government has made it compulsory for Scottish local authorities to sign up to the scheme. It is possible for children and their legal representatives to request transfers, and decisions are made which take into account the best interests of the child. It is unclear whether Scottish local authority decisions about whether to accept/facilitate the transfer of a child or not, or other actions as they relate to the NTS, are devolved or reserved functions. Our view is that they are devolved functions.
- Age assessment – this is a process by which the age of asylum-seeking children is disputed by a public body, e.g. the Home Office or a local authority, and a formal process called an age assessment takes place. Currently, it is viewed as a devolved function because it involves a local authority social work services department conducting an assessment of age to determine eligibility for child services under the Children (Scotland) Act 1995. The Nationality & Borders Act 2022, at section 50, provides for the ability of local authorities to refer to a Home Office team called a National Age Assessment Board (NAAB) to conduct an assessment. These assessments are binding on Scottish local authorities. Other assessments conducted by the NAAB are designated as purely for immigration purposes (s.51 Nationality & Borders Act 2022) and are not binding on local authorities.

The above are just three examples of where clarity between reserved and devolved functions is required, for children and for public bodies. The Nationality & Borders Act 2022 (for which the Scottish Parliament voted on a Legislative Consent Motion) has

created additional uncertainty in these areas. The children to whom they relate are some of the most at risk in our society. The consequences of unlawful decision-making are severe, up to and including detention and removal from the UK. It is possible that there may be preliminary disputes in the enforcement of the Bill in the courts which focus on the question of “*is it a devolved or reserved function*”. It would be welcomed if, in the process of implementation of the Bill, uncertainty could be minimised so as to allow clarity for public bodies and children and families. We would encourage the Scottish Government to work with stakeholders in this regard.

***III. What impact do you think the fixes outlined above would have on the policy objectives of the UNCRC Bill?***

***IV. What, if any, gaps in rights protection do you foresee if the Scottish Parliament proceeds to pass a revised UNCRC Bill at Reconsideration Stage using the fixes outlined above?***

In response to these two questions together, there appears to be what can be described as a ‘two-tier justiciability gap’ which has been created as a result of the UK Supreme Court’s judgement. However, we are uncertain if there is any other way to avoid it and we understand that the Scottish Government has taken advice on this matter.

This gap is contained in sections 20 and 21 of the Bill. The proposed fixes remove Acts of the UK Parliament (AUKP) from their provisions, meaning that declarations of incompatibility or strike downs cannot be issued against AUKP, whereas they can be issued against Acts of the Scottish Parliament (ASP). From a child or young person’s perspective, the origin of the piece of legislation ought not to matter, if it can be said to be non-compliant with the UNCRC.

The question is therefore how, within the realms of the devolution settlement, can Scottish Ministers follow through on the policy objective of the Bill and seek to close this justiciability gap, ensuring that AUKPs which concern devolved functions, e.g. the Children (Scotland) Act 1995, are held to as close a remedial standard as possible as ASPs?

We note that, despite the UK Supreme Court judgement, the Scottish Parliament retains the ability to amend or repeal AUKPs in devolved areas. We see the Children’s Scheme in the Bill as a key element to ensure that AUKPs are addressed in terms of compatibility. We would welcome the Scottish Government’s views on what, if any, other methods it is considering to ensure that Scottish Ministers are incentivised or indeed compelled to request the Scottish Parliament to take action in this regard (of course respecting that the Scottish Parliament can vote against any such action).

## **Conclusion**

In summary, we welcome the fixes contained in the Bill. We are committed to engaging with the Scottish Government to navigate these in practice and to ensure that the rights in the UNCRC remain justiciable for children and young people in Scotland.