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

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UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill

Reconsideration Stage

1. During the passage of the UN Convention on the Rights of the Child Bill, the Scottish Government, MSPs, the Children's Commissioner, and third sector campaigners articulated two distinct policy goals for the incorporation of the UNCRC into Scots law: (i) a **maximalist application of children's rights** to areas of law falling within devolved competence which nevertheless (ii) **minimised complexity** for rights-holders and duty bearers – aiding them, their advocates and advisers to identify which situations, decisions and legal frameworks the new rights apply to, with **clarity** about what remedies are available, and against whom.

2. In reconsidering the Bill in the light of Lord Reed's *Reference* judgment, some stakeholders have understandably renewed their demands for maximum coverage, *and* clarity, *and* simplicity, suggesting – or perhaps just hoping – that there remains scope for the Bill to service all these aspirations in the wake of the Supreme Court's judgment. Some of the parliamentary and extra-parliamentary debate since 2021 has also suggested there must be quick and simple fixes to the legal problems the Supreme Court identified. In my view, this position ignores just how profoundly the judgment undermined the logic of the initial proposal, and the extent of the compromises now required to bring the Bill within legislative competence.

3. Put simply: it is no longer possible for the Scottish Parliament to incorporate the UNCRC into devolved law in a maximalist, clear or uncomplex way. After the *Reference* judgment, there is no coherent or un-messy way for you to incorporate this – or any other international human rights framework – into Scots law. In revisiting the Bill and considering the amendments the Scottish Government now proposes, you can only choose which kind of complexity, fragmentation and incoherence you prefer.

4. As originally passed, the Bill created three key new legal duties, aspects of which were successfully challenged before the UK Supreme Court. Section 19 provided that Acts of the UK and Scottish Parliaments falling within devolved competence "must be read and given effect in a way which is compatible with the UNCRC requirements" by Scottish courts ("the **interpretative obligation**"). Section 20 gave courts the power to make declarators striking down legislation if they found provisions of Acts of the UK or Scottish Parliament within

devolved competence incompatible with children's rights ("the **strike down power**"). Section 21 also empowered the courts to make "incompatibility declarators" about future legislation inconsistent with the UNCRC ("**declarations of incompatibility**"). These proposals were broadly inspired by the existing human rights provisions in the Scotland Act 1998 and the Human Rights Act 1998.

5. The Bill's original approach would have meant that potential litigants with a children's rights issue only had to ask themselves whether or not the legislation they were seeking to challenge or review fell within devolved competence, rather than worrying about which parliament passed the original legislation, or amended it, or how. While ascertaining whether a given issue falls within devolved competence is not always a straightforward – Schedule 5 of the Scotland Act sets out these reservations in an accessible and generally clear way.

6. In the *Reference* judgment, the Court concluded that each of these elements of the original Bill – insofar as they applied to legislation originating in the Westminster Parliament – fell outwith Holyrood's legislative competence. It is important to understand why. The Scotland Act 1998 created a Scottish Parliament with plenary legislative power over matters which are not reserved to Westminster. Section 28(7) of the 1998 provided that nevertheless devolution "does not affect the power of the Parliament of the United Kingdom to make laws for Scotland."[1]

7. To the surprise of most legal observers, the Supreme Court interpreted this provision – which reads like a mundane restatement of the principle that "power devolved is power retained" – much more expansively, holding that the interpretative duty proposed in the Bill, its strike down powers as applied to Acts of the Westminster Parliament and the proposed power for the courts to make declarations of incompatibility impermissibly restricted the "unqualified power of [the UK] Parliament to make laws for Scotland," and so fell outside Holyrood's powers.[2]

8. In addition to these contested elements, the Court also upheld a separate challenge to section 6 of the Bill. As first passed, this provision purported to require public authorities generally to act consistently with the UNCRC obligations, irrespective of whether or not the public

[1] Scotland Act 1998, s 28(7).
[2] *UNCRC Reference* [2021] UKSC 42, para 21.

authorities in question were subject to devolved competence.[3] The Scottish Government's position before the Supreme Court was that although *prima facie* outside Holyrood's legislative competence, this provision could be "read down" by courts under section 101(2) of the Scotland Act, effectively requiring only public authorities within Holyrood's legislative competence to comply. Lord Reed rejected this approach, holding that that section 101(2) of the Scotland Act cannot have been intended to enable the courts to undertake a:

> rewriting of provisions enacted by the Scottish Parliament, which on their face are plainly and unambiguously outside its legislative competence, so as eventually, if sufficient cases are decided, to produce an outcome which accurately reflects the limits on legislative competence set out in the Scotland Act.[4]

This returned the difficult issue of how to apply UNCRC duties to public authorities within devolved competence to the Scottish Government – requiring Scottish Ministers to delineate more clearly on the face of the Bill *which* public authorities are to be subject to the UNCRC, or which of their *powers* are to be subject to it – or both.

9. While Lord Reed's judgment extols the importance of creating "a consistent and predictable interpretation, so that the Scottish Parliament has a coherent, stable and workable system within which to exercise its legislative power," the real effect of the judgment has been to make it extremely difficult to incorporate *any* new human rights framework under devolution which is coherent, accessible or easily workable.[5]

10. This is because the Supreme Court's judgment ignores the character of the modern Scottish statute book, 25 years after devolution. In devolved areas, the statutory framework now roughly consists of five kinds of legislative provision, including:

- Acts of the Scottish Parliament which establish or re-codify whole areas of law;
- Acts originally passed by Westminster falling within devolved competence which Holyrood *have not* amended since 1998;
- Acts of the Westminster Parliament which *have* been amended by the Scottish Parliament during that time;

[3] *UNCRC Reference*, para 2.
[4] *UNCRC Reference*, para 79.
[5] *UNCRC Reference*, para 7.

- Acts of the Scottish Parliament which subsequent Scottish Parliaments have themselves amended; and
- In some more limited areas, Acts of the Scottish Parliament which have since been amended by Westminster – with or without consent.

11. The *Reference* judgment holds that any primary legislation – whether an original Act or an amendment – emanating from the UK Parliament cannot be made subject to the UNCRC, even if Holyrood has the legislative competence under the Scotland Act to amend or repeal it directly. This aspect of the judgment means that we now must be concerned with the *source* of statutory authority in determining whether it can be made subject to the interpretative obligation and strike-down powers – rather than simply asking the question of whether the issue dealt with in the legislative provision is devolved or not.

12. Given these limitations, the Bill you are now reconsidering can only achieve **maximum coverage** by applying the UNCRC both to Acts of the Scottish Parliament and to **amendments** Acts of the Scottish Parliament have made to legislation originating in Westminster. As the Scottish Government has identified, however, applying the UNCRC to Scottish amendments to UK legislation would inevitably be fraught with complexity. As you know from your own parliamentary experience, UK legislation has routinely been amended in devolved areas since 1998. Sometimes these amendments have introduced or repealed whole sections of the original Act. Sometimes they have changed just word or two.

13. In the field of children's rights, for example, several Acts have been amended in recent years to change the age thresholds from "under 16" to "under 18" in the criminal justice context – while leaving the surrounding text untouched. If provisions of Westminster legislation cannot be subject to UNCRC review because of the UK Parliament's "unqualified power to make laws for Scotland" but Holyrood's changes *can* – then in this extreme example, the inclusion of the number "18" in the legislation *would* be subject to UNCRC review, but the surrounding text which makes sense of the amendment could not be. If this sounds baffling, incoherent and fragmented – it is because it is.

14. This is the legal context behind the Scottish Government's recommendations. As the Cabinet Secretary outlined in her letter to the Committee on the 13th of September, she has decided to reduce **complexity** for rights-holders and duty bearers at the expense of the **reach** of the new UNCRC obligations. The Government now propose that the Bill's:

> powers to strike down legislation or to declare legislation incompatible apply only in relation to legislation originating from the Scottish Parliament. Legislation originating from the UK Parliament cannot be struck down or declared incompatible on the grounds that it is incompatible with the UNCRC requirements.[6]

"To try to reduce complexity," the Scottish Government also now propose that "neither the compatibility nor the interpretative duties will apply to powers conferred by amendments to UK Acts made by Acts of the Scottish Parliament" arguing that "to do so would be especially complex for users."[7]

15. In my judgement, they are right about that. The very limited **maximalist** approach to UNCRC incorporation now available to you – applying the UNCRC to Acts of the Scottish Parliaments and any amendments Holyrood has made to laws originating in Westminster – is guaranteed to confuse rights-holders and duty-bearers under the Bill.

16. But adopting the Scottish Government's proposals and *not* including amendments within the scope of the Bill also has significant consequences for the coherence and credibility of the proposed incorporation of children's rights. Failing to make Holyrood amendments to UK legislation subject to UNCRC review means that significant areas of Scots law relevant to the rights of children will not now be subject to the UNCRC regime. Several important consolidating Acts fall into this category – including the Children (Scotland) Act 1995, the Criminal Procedure (Scotland) Act 1995, and the Education (Scotland) Act 1980, to name but three.

17. This approach is likely to frustrate litigants who will be puzzled why flagship sources of Scots law on children's rights – dealing with adoption, schooling, care and criminal justice, for example – are not subject to the UNCRC principles. Under this model, public authorities subject to the UNCRC principles will still face significant complexity in ascertaining whether a given decision or policy is subject to potential litigation under the Bill, as COSLA has already cogently explained to the Committee. When I said that you can now only choose which kind of complexity, fragmentation and incoherence you prefer in the wake of the *Reference* judgment – this is exactly the kind of trade-off I meant.

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[6] Letter from the Cabinet Secretary for Social Justice to the Equalities, Human Rights and Civil Justice Committee 13th September 2023, 2. https://www.parliament.scot/-/media/files/committees/equalities-human-rights-and-civil-justice-committee/correspondence/2023/reconsideration-of-the-uncrc-incorporation-scotland-bill-letter-of-13-september-2023.pdf

[7] *Ibid*, 3.

18. Looking further forward, the issues you are reconsidering with this Bill also have wider application and anticipate the challenges the Parliament will face in incorporating any further human rights regimes into domestic law. The Scottish Government has recently consulted on a proposed Human Rights Bill which aims to incorporate a range of the UK's other international obligations into domestic law, including the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination Against Women, and the Convention on the Rights of Persons with Disabilities. Everything said about the difficulties facing this Bill in the wake of the Supreme Court's *Reference* judgment applies just as powerfully to incorporating any further international rights frameworks into Scots law.

19. To conclude more positively – UNCRC coverage seems likely to increase over time, reducing these anomalies, reducing complexity for potential litigants and public authorities, and closing the gaps in the law the Supreme Court's judgment and the Scottish Government's amendments will necessarily create.

20. One impact of the *Reference* judgment may be that the Scottish Parliament now has a stronger incentive when passing legislation which touches on fundamental rights *not* to amend existing UK legislation, but instead to re-legislate wholesale in a new Scottish Act. This may also be a consideration in terms of future legislative consent decisions for the Parliament, where Westminster proposes to legislate in devolved areas with significant children's rights implications.

21. This is likely to make the law-making process longer and more time-consuming – as consolidating Bills may end up being longer than they might otherwise have been, re-enacting uncontroversial existing provisions which will nevertheless require parliamentary scrutiny. There are opportunity costs here – but reconsolidating the law into Scottish statutes is one practical way to extend the application of UNCRC principles. This may also have the collateral benefit of making the law more accessible, reducing legal principles to a smaller number of sources rather than retaining a statute book which is piecemeal and scattered over diverse different Acts, enhancing the accessibility of law to the wider public.

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