EXPLANATORY NOTES

United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 (asp 1)

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These notes relate to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 (asp 1)
which received Royal Assent on 16 January 2024

UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (INCORPORATION) (SCOTLAND) ACT 2024

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024. They do not form part of the Act and have not been endorsed by the Parliament.

2. These Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

OVERVIEW OF THE ACT

3. The Act incorporates into Scots law the United Nations Convention on the Rights of the Child ("the Convention"), an international human rights treaty covering all aspects of children's lives including civil, political, economic, social and cultural rights.

4. The Act provides for rights and obligations derived from the Convention, and its first 2 optional protocols, to be given effect in Scots law in the following ways:

- it places public authorities under a duty not to act incompatibly with the UNCRC requirements as defined in section 1, and provides legal remedies should they fail to do so (Part 2);
- it places public authorities, when exercising certain functions, under duties to publicly account for their compliance with, and efforts to go beyond, the UNCRC requirements – in particular it places the Scottish Ministers under a duty to produce, and periodically report against, a scheme setting out what they are doing to comply with their duty in relation to the UNCRC requirements and places a duty on certain other public authorities to produce periodic reports on their compliance with those requirements (Part 3);
- it requires statements to be made, when certain types of legislation are brought forward, about the legislation's compatibility with the UNCRC requirements (Part 4, section 23);
- it requires that legislative words (whenever enacted) originating from the Scottish Parliament be read wherever possible in a way that is compatible with the UNCRC requirements and, where a compatible reading is not possible, it allows the courts

to either (depending on when the incompatible words were enacted) strike the words down or make a declaration of their incompatibility (Part 4, sections 24 to 26);

- it sets up procedures for the courts to address questions about the compatibility of legislative words or public bodies' actions with the UNCRC requirements (Part 5);
- it enables the Scottish Ministers to change the law, by regulations, to cure incompatibilities (or potential incompatibilities) with the UNCRC requirements (Part 6).

5. Provisions in the Act fall to be read in accordance with the interpretation rules in Part 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.

PART 1 AND THE SCHEDULE: THE UNCRC REQUIREMENTS

6. Part 1 deals with the interpretation of key concepts used in the subsequent Parts.

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

7. The rights and obligations that the Act's later Parts deal with are labelled as "the UNCRC requirements" by section 1. They are derived from the Convention and the 2 optional protocols ratified by the United Kingdom. The text of those parts of the Convention and its optional protocols that are comprehended by the label "the UNCRC requirements" is set out in the schedule (the content of which may be changed in future by regulations under section 3).

8. In public international law, the Convention and its optional protocols have effect in relation to the United Kingdom subject to any reservations, objections or interpretative declarations made by the United Kingdom. Section 1(3) provides that, for the Act's purposes, the UNCRC requirements are to have effect subject to the same reservations, objections and interpretative declarations as apply, in public international law, to the treaty obligations of the United Kingdom from which the UNCRC requirements are derived.

Section 2: Meaning of references to States Parties and related expressions in the UNCRC requirements

9. The UNCRC requirements refer throughout to States Parties. The purpose of section 2 is to allow such references to be read generally as including references to public authorities under the Act. There are also certain places in the UNCRC requirements where a reference to States Parties, to a State Party or to a related expression like "jurisdiction" or "territory" needs to be read as something different to make sense in the domestic context, so the table in subsection (3) provides for those references to be read with modifications to achieve that effect.

10. In relation to article 2 of the Convention as set out in the UNCRC requirements, the table also contains a modification so that the reference in that article to States Parties is read as a reference to a more restricted class of public authority, for reasons of legislative competence.

Section 3: Power to modify the schedule

11. Section 3 gives the Scottish Ministers the power, by regulations, to modify the terms of the schedule, which sets out the text of those parts of the Convention and its optional protocols that are comprehended by the label "the UNCRC requirements". By changing the terms of the schedule, the Scottish Ministers can therefore change what is required of those public authorities that the later Parts of the Act oblige (when exercising certain functions) not to act incompatibly with the UNCRC requirements.

12. The Scottish Ministers' regulation-making power to change what constitutes the UNCRC requirements is subject to limitations. Provisions from the Convention and its first and second optional protocols that are already in the schedule cannot be removed. In relation to those sources, regulations can only add provisions not already included or make adjustments to reflect amendments to the treaties on which they are based.

13. The power to make changes to reflect amendments to the treaties can only be used to reflect amendments that are binding on, and in force in relation to, the United Kingdom as a matter of international law. Regulations modifying the schedule to reflect a treaty amendment can be made in advance of that amendment coming into force in relation to the United Kingdom, provided that the modification provided for in the regulations does not take effect before the treaty amendment enters into force.

14. The Scottish Ministers can also exercise the power to change what constitutes the UNCRC requirements to take account of optional protocols to the Convention other than the first and second (which are already covered by the schedule). The power to do so is restricted so that the schedule can only be modified to take account of protocols that have been ratified by the United Kingdom and the modifications cannot take effect until the protocol in question has entered into force in relation to the United Kingdom.

15. Sections 1, 4 and 15 specifically refer to the Convention and its first and second optional protocols. So if, for example, the schedule were to be modified by regulations to incorporate obligations arising from the third optional protocol, sections 1, 4 and 15 would need to be adjusted too in order to refer to that protocol. Section 3(5) enables the Scottish Ministers to make such changes to sections 1, 4 and 15 by regulations. There may also be a wish to include a definition in section 42, so that section may be amended too.

16. Regulations under section 3 are subject to parliamentary scrutiny by way of the affirmative procedure, which is set out in section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010. It means that the regulations cannot be made unless the Scottish Parliament approves a draft of them. Section 3 further provides that draft regulations cannot be laid before the Parliament until the Scottish Ministers have consulted the Commissioner for Children and Young People in Scotland, the Scottish Commission for Human Rights and any other persons they consider it appropriate to consult.

Section 4: Interpretation of the UNCRC requirements

17. Section 4 sets out sources of information a court or tribunal may wish to take into account when considering how the UNCRC requirements should be understood, so far as that is relevant to the interpretation of the UNCRC requirements in a given case.

18. As explained in paragraph 7, the schedule sets out the UNCRC requirements as derived from text of parts of the treaties. This means that the schedule does not include the full text of those treaties or their preambles. As a matter of public international law, the text of any part of a treaty has to be interpreted against the backdrop of the treaty's full text and preamble. 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 allows a court or tribunal that is determining a question about the UNCRC requirements to 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.

19. Guidance about the meaning of the treaties from which the UNCRC requirements are derived may also be found in the work of the United Nations Committee on the Rights of the Child, a body established to monitor implementation of children's rights under article 43 of the Convention. There are various procedural routes which can lead to the UN committee expressing formal views about the requirements of the treaties. One of the interpretative aids that section 4 allows domestic courts applying the UNCRC requirements to take into account, so far as relevant to the interpretation of the UNCRC requirements in a case, are the views formally expressed by the UN committee. Another is other international law, and comparative law (which is the socio-legal study of differences between legal systems).

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

20. Section 5 requires the Scottish Ministers to modify section 4 by regulations in the event that the United Kingdom ratifies the third optional protocol to the Convention. This might be used for example to add reference to any parts of the third optional protocol or the protocol's preamble to the material that can be used for interpretative purposes.

21. The third optional protocol is defined for the purposes of section 5 in section 4.

PART 2: DUTIES ON PUBLIC AUTHORITIES

22. Part 2 establishes the duty of public authorities not to act incompatibly with the UNCRC requirements (as defined in section 1) when exercising certain functions, and makes provision about the consequences of any failure to do so.

Section 6: Acts of public authorities to be compatible with the UNCRC requirements

23. Section 6(1) provides that public authorities act unlawfully if they act, or fail to act, in a way that is incompatible with the UNCRC requirements in connection with a relevant function. Effectively, therefore, it imposes a duty on public authorities to act compatibly with the UNCRC requirements when exercising relevant functions. Even where a relevant function is being carried out, however, an incompatible action or failure to act is not unlawful in certain, limited circumstances – see subsection (4), and paragraphs 31 to 34 below.

Meaning of "relevant function"

24. Subsection (2) defines "relevant function". It sets out two tests, both of which need to be satisfied in order for a function to be a "relevant function".

25. The first test, set out in subsection (2)(a), is that the function could competently be conferred on the public authority in question by the Scottish Parliament (the limits of the Parliament's legislative competence are set out in section 29 of the Scotland Act 1998). So, for example, functions (whether statutory or common law[1]) relating to reserved matters (as set out in schedule 5 of the Scotland Act 1998) are not relevant functions.

26. The second test is that the function must be conferred by legislation or a rule of law of a type mentioned in subsection (2)(b)(i) to (iv) (legislation being the more usual way in which functions are conferred on public authorities). Essentially, the types of legislation listed in subsection (2)(b)(i) to (iii) are those enacted by the Scottish Parliament, or enacted by virtue of the Scottish Parliament delegating its power to make legislation – so Acts of the Scottish Parliament, Scottish statutory instruments made entirely under a power conferred by an Act of the Scottish Parliament, and Scottish statutory instruments made partly under a power conferred by an Act of the Scottish Parliament and partly under a power conferred by an Act of the UK Parliament. In the latter case, only functions conferred by provisions in the instrument which were made solely by virtue of the power conferred by the Act of the Scottish Parliament, plus provisions subsequently inserted directly into the instrument by an Act of the Scottish Parliament (or other subordinate legislation made under a power conferred by an Act of the Scottish Parliament), are subject to the subsection (1) compatibility duty.

27. This means that functions conferred by the following are not subject to the subsection (1) compatibility duty:

- Acts of the UK Parliament,
- statutory instruments made (including by the Scottish Ministers) by virtue of powers conferred by Acts of the UK Parliament,
- those provisions of Scottish statutory instruments made partly under a power conferred by an Act of the Scottish Parliament and partly under a power conferred by an Act of the UK Parliament which are made wholly or partly by virtue of the power conferred the Act of the UK Parliament (or subsequently inserted by an Act of the UK Parliament or by virtue of a power conferred by such an Act).

28. As functions relating to reserved matters are already excluded by subsection (2)(a), subsection (2)(b)(i) to (iii) mainly serves, in practice, to exclude functions relating to devolved matters created by or under the authority of the UK Parliament. This means, for example, that functions conferred by pre-devolution Acts of the UK Parliament are not subject to the subsection (1) compatibility duty, even where the subject matter of such Acts is devolved. Examples of such functions include, at the time of publication of these Notes, functions conferred by the Education (Scotland) Act 1980, the Children (Scotland) Act 1995 and the Criminal Procedure (Scotland) Act 1995. The coverage of the subsection (1) compatibility duty may expand over time, however, if such Acts are repealed and replaced with new provision enacted by the Scottish Parliament in the types of legislation mentioned in paragraph 26 above.

[1] Common law functions relating to devolved matters, in contrast, are "relevant functions" by virtue of subsection (2)(b)(iv).

29. Section 42(2) makes provision in relation to the situation where one enactment inserts words into another enactment (which is very common) and the inserted words confer a function. The function is to be regarded as conferred only by the enactment which has been modified (and not by the enactment which inserted the new words into the modified enactment). The effect of this is that (for example) a function conferred by words inserted, by an Act of the Scottish Parliament, into an Act of the UK Parliament is not a relevant function under subsection (2)(b) (as the modified enactment – an Act of the UK Parliament – is not of a type listed in that subsection). The subsection (1) compatibility duty therefore does not apply in relation to such a function.

30. Another example of the operation of section 42(2) is where a function is conferred by words inserted, by an Act of the UK Parliament, into an Act of the Scottish Parliament. Such a function is (unless excluded by subsection (2)(a) due to relating to a reserved matter) a relevant function, and so the subsection (1) compatibility duty applies. However, the further provision made by subsection (4)(b) may also be relevant in such cases and this is explained further below.

Circumstances where incompatible action or failure to act in connection with a relevant function is not unlawful

31. It is not sufficient for an incompatible action or failure to act to relate to a relevant function in order for the action or failure to be unlawful under subsection (1): subsection (1) is also subject to subsection (4). Subsection (4) provides that an incompatible action or failure by a public authority in connection with a relevant function is not unlawful if the public authority was required or entitled to act in the way it did (that is, incompatibly) by words which are not contained in an enactment of a type listed in subsection (2)(b) – that is, by words contained in enactments made by, or by virtue of powers conferred by, the UK Parliament rather than by, or by virtue of powers conferred by, the Scottish Parliament (subsection (4)(a)).

32. Further, subsection (4)(b) provides that the public authority does not act unlawfully if it was required or entitled to act incompatibly by words contained in an enactment that is made by, or by virtue of powers conferred by, the Scottish Parliament if the particular words in question were inserted by an enactment made by, or by virtue of powers conferred by, the UK Parliament.

33. Any requirement or entitlement to act incompatibly which emanates from the UK Parliament will therefore result in a public authority, which is acting in accordance with such a requirement or entitlement, not acting unlawfully under subsection (1). It does not matter for this purpose whether the requirement or entitlement is inserted directly into (for example) an Act of the Scottish Parliament or whether the requirement or entitlement is given effect via an Act of the UK Parliament (for example) making a non-textual modification (or "gloss") of the Act of the Scottish Parliament.

34. This does not mean that any incompatible action or failure relating to a function conferred by (for example) a provision in an Act of the Scottish Parliament which includes words inserted by (for example) an Act of the UK Parliament is lawful. The requirement or entitlement to act incompatibly must flow from the inserted words in order for subsection (1) not to apply.

Meaning of "public authority"

35. The phrase "public authority" is not exhaustively defined by section 6 and so is to be given its ordinary meaning. The courts have considered in a number of cases the meaning of the phrase "public authority" in the analogous section 6 of the Human Rights Act 1998. Subsection (5)(a) does provide some particular examples of public authorities, with subsections (6) to (8) then providing additional information, in relation to persons mentioned in subsection (5)(a)(iii), as to when functions are of a public nature.

36. Subsection (5)(b) makes provision in relation to the Scottish Parliament, which is specifically excluded from the definition of "public authority" and therefore the compatibility duty. Persons carrying out functions in connection with proceedings in the Scottish Parliament are also excluded from the definition. (But see section 21 (reporting duty on the Scottish Parliament)).

37. By virtue of the definition of "relevant function" in subsection (2), some public authorities will be subject to the section 6 compatibility duty when exercising certain functions and not when exercising other functions. For example, where some of a public authority's functions relate to reserved matters, those functions are not subject to the compatibility duty by virtue of subsection (2)(a). Similarly, where some of a public authority's functions are (for example) conferred by an Act of the UK Parliament and some by an Act of the Scottish Parliament, the public authority is only subject to the compatibility duty when acting in relation to functions conferred by the Act of the Scottish Parliament.

Section 7: Proceedings for unlawful acts

38. Section 7 confers the following rights on any person (as defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010):

- the right to bring proceedings against a public authority in a civil court or tribunal for acting, or proposing to act, in a way that section 6(1) makes it unlawful for the authority to act;
- the right to invoke the UNCRC requirements against a public authority in proceedings before a court or tribunal (for example by highlighting the incompatibility of the authority's actions with the UNCRC requirements, and hence their unlawfulness, by way of a defence in proceedings brought by the authority against the individual).

39. Subsection (5) requires the Scottish Ministers to bring forward regulations adding to the powers of a tribunal if they think it necessary to do so to ensure that the tribunal can provide an appropriate remedy. Subsection (7) requires them to consult the Commissioner for Children and Young People in Scotland, the Scottish Commission for Human Rights and any other persons they consider it appropriate to consult before laying draft regulations under subsection (5) before the Scottish Parliament. Regulations under subsection (5) are subject to parliamentary scrutiny by way of the affirmative procedure.

40. The right to bring proceedings against a public authority under section 7(1)(a) is subject to the following restrictions:

- proceedings cannot be brought **against** a public authority in relation to any alleged incompatible act that took place before the day that section 7 comes into force, although the UNCRC requirements may be relied upon by a person in proceedings brought **by** a public authority whenever the act took place, even if the alleged incompatible act took place before the day that section 7 comes into force;
- section 10 restricts how proceedings may be brought in respect of judicial acts (see paragraphs 51 to 55 below);
- proceedings cannot be brought after the applicable deadline (see below) (subject to the discretion that the court or tribunal in question may have to allow proceedings to be brought after the deadline).

41. The applicable deadline for bringing proceedings against a public authority under section 7(1)(a) will depend on the procedure by which the proceedings are brought. Subsection (9) provides that the proceedings must be brought within a year of the act complained of taking place. But this is subject to subsection (10), the effect of which is that if, under the procedure by which the proceedings are brought, the period within which the proceedings must be brought is less than a year, then the proceedings must be brought within that shorter period. For example, judicial review proceedings are generally subject to a 3-month time limit, therefore proceedings under section 7(1)(a) brought by way of judicial review would have to be brought within 3 months of the act complained of (unless the court exercised its discretion to allow the proceedings to be brought outwith that period).

42. Subsection (11) provides that the clock does not start ticking on the 1-year period specified in subsection (9) until the individual by whom, or on whose behalf, the proceedings are brought turns 18. A court or tribunal can allow proceedings to be brought after the 1-year period has expired if satisfied that it is equitable to do so in the circumstances.

43. Subsection (13) of section 7 deals with the time limit for bringing proceedings under section 7(1)(a) to the supervisory jurisdiction of the Court of Session. Applications to the Court's supervisory jurisdiction are usually known as judicial review. Subsection (13) amends section 27A of the Court of Session Act 1988 so that the same rule that subsection (11) applies to the calculation of the 1-year time limit under subsection (9) applies to the calculation of the 3-month time limit that section 27A of the 1988 Act sets for applications to the Court's supervisory jurisdiction. In other words, the clock does not start ticking on that 3-month period until the individual by whom, or on whose behalf, the application to the Court is to be made turns 18. This is subject to section 27A(2) of the 1988 Act, so that where an enactment sets a deadline for bringing judicial review proceedings that is shorter than 3 months, this extension of time will not apply.

Section 8: Judicial remedies

44. Section 8 deals with the remedies that a court or tribunal can grant on finding that a public authority has acted, or was proposing to act, unlawfully under section 6(1).

45. Subsection (1) confirms that the court or tribunal can grant any relief or remedy, or make any order, that it is within its powers to grant or make.[2] The rest of the section is concerned with damages as a remedy (see also section 10(3) on the subject of damages).

46. Subsection (2) sets out that nothing in the Act empowers a court or tribunal to award damages if that court or tribunal does not otherwise have the power to do so.

47. Traditionally damages for wrongs are awarded in Scotland on the basis of trying to put the wronged person back into the position that the person would have been in had the wrong not occurred. Subsection (3) places a duty on courts and tribunals considering whether to award damages for an unlawful act under section 6(1), and how much to award, to consider those questions on the basis of what is necessary to provide just satisfaction to the person. This is the principle on the basis of which damages are awarded under section 8 of the Human Rights Act 1998.

48. Subsection (4) applies section 3 (contribution among joint wrongdoers) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 to any award of damages under this section. Equivalent provision is contained in section 8(5)(a) of the Human Rights Act 1998.

49. Subsection (5) precludes an award of damages from being made to the Commissioner for Children and Young People in Scotland or the Scottish Commission for Human Rights.

Section 9: Child's views on effectiveness of reliefs etc.

50. Section 9 requires the court or tribunal, when considering what relief or remedy to grant or what order to make, to give the child an opportunity (so far as practicable) to express views about the effectiveness of that measure and to have regard to those views. But the court or tribunal need not do so if satisfied that the child has been shown to be incapable of forming a view.

Section 10: Restriction on proceedings in respect of judicial acts

51. Courts and tribunals are public authorities for the purposes of section 6 and so require to comply with the duty imposed by section 6(1). Thus if a court or tribunal makes a decision that is unlawful under that section during, or at the conclusion of, a case before it, that judicial act may itself be challenged in further proceedings before a court or tribunal under section 7(1)(a).

52. There are established processes for challenging the judicial acts of courts and tribunals, and section 10(1) and (2) require that they be used. For example, it would not be appropriate for a sentencing decision taken at the conclusion of a criminal trial by the High Court of Justiciary, Scotland's supreme criminal court, to be challenged by way of a civil action for damages in the sheriff court, which is lower in the judicial hierarchy. Any complaint that the High Court made an error while sitting as a trial court, including an error by acting unlawfully under section 6(1), should properly be dealt with by way of an appeal to the High Court.

[2] But see also section 33 of the Children (Care and Justice) (Scotland) Act 2024, which adds a new subsection (6) into section 8, noting that the court's power under section 8(1) is modified, in certain cases involving UNCRC compatibility issues in criminal proceedings, by section 288BZA of the Criminal Procedure (Scotland) Act 1995.

53. Section 10(1) mentions the possibility of challenging a judicial act through any right of appeal or by application to the supervisory jurisdiction of the Court of Session. Subsection (2) makes clear that subsection (1) is not to be read as allowing an application to the Court's supervisory jurisdiction that would otherwise be impermissible. For example, it is not to be taken to allow an application to be made to the Court of Session, Scotland's supreme civil court, contesting a decision taken in an appeal in a criminal case by the High Court.

54. Paragraph (c) of section 10(1) allows for the possibility of court rules providing a new process to challenge a judicial act that is alleged to be unlawful under section 6(1) should a need be identified to have a process for that besides the ordinary processes referred to in paragraphs (a) and (b). Section 44 makes further provision about court rules.

55. Section 10(3) prevents damages from being awarded against a court or tribunal if the impugned judicial act was done in good faith (on the subject of damages generally, see section 8).

Section 11: Power for Commissioner to bring or intervene in proceedings

56. The Commissioner for Children and Young People in Scotland is an office established by the Commissioner for Children and Young People (Scotland) Act 2003. Being a statutory office, the Commissioner can only do those things that statute empowers the Commissioner to do. Section 11 of the Act amends section 4 of the 2003 Act so that the following are included amongst the things that the Commissioner is empowered to do:

- bringing proceedings in a court or tribunal on the grounds that a public authority has acted, or proposes to act, unlawfully under section 6(1);
- intervening in court or tribunal proceedings in which someone else is levelling that charge against a public authority.

Section 12: Power for Scottish Commission for Human Rights to bring or intervene in proceedings

57. The Scottish Commission for Human Rights is a body established by the Scottish Commission for Human Rights Act 2006. Section 12 inserts a new section into that Act to empower the Commission to bring or intervene in proceedings in the same way that section 11 empowers the Commissioner for Children and Young People in Scotland.

Section 13: Guidance on this Part

58. Section 13 requires the Scottish Ministers to issue guidance to support the operation and implementation of Part 2 of the Act. Subsection (2) contains a non-exhaustive list of things that the guidance may do. Before issuing guidance under section 13 for the first time, or issuing any revised guidance, the Scottish Ministers must consult children, the Commissioner for Children and Young People in Scotland, the Scottish Commission for Human Rights and such other persons as they consider appropriate.

PART 3: CHILDREN'S RIGHTS SCHEME, CHILD RIGHTS AND WELLBEING IMPACT ASSESSMENTS AND REPORTING DUTIES

59. Part 3 contains a range of provisions aimed at promoting transparency in relation to compliance with public authorities' compatibility duty under section 6(1) and their efforts to secure better or further effect of children's rights.

Sections 14 and 15: Children's Rights Scheme

60. Section 14 requires the Scottish Ministers to make a scheme, to be known as the Children's Rights Scheme ("the Scheme"), which sets out the arrangements that they have made, or propose to make, in order to comply with the duty under section 6(1) and secure better or further effect of children's rights.

61. The arrangements that may be set out in the Scheme are wide ranging and may deal with both strategic and practical matters. Subsection (3) sets out some material that the Scheme must include and the outcomes that are to be achieved, but this list is not exhaustive of what the Scheme may include.

62. Once up and running, the Scheme is to be reviewed on an annual basis with a report on the operation of the Scheme being published following each review (section 16, see paragraphs 69 to 73 below). However, the first Scheme will specify the date by which the first report is due in order to enable the annual reporting cycle to be established. The first Scheme may also contain any specific actions that the Scottish Ministers are to take in respect of matters relating to the Scheme in respect of the period from the first Scheme being made until the first report on its operation is published. This will differ from the core content of the Scheme which will tend to cover ongoing processes or frameworks as opposed to specific actions that are to be taken in the coming year. For example, the Scheme may set out the procedure to be followed when preparing a child rights and wellbeing impact assessment, while the actions may indicate that the Scottish Ministers intend to carry out such an assessment in relation to a particular piece of legislation or strategic decision.

63. Section 15 sets out the procedure that the Scottish Ministers must follow to prepare and make the Scheme and, once it has been made, to amend or replace it. For the purposes of this section, the draft Scheme, the proposed amendment or draft replacement Scheme is referred to as "the proposal". Subsection (8) enables the Scottish Ministers to begin the process of preparing and consulting on a proposal for the Scheme before the section comes into force.

64. The procedure may be summarised as comprising the following steps.

Step 1 – preparation

65. The Scottish Ministers must prepare the proposal having regard to the documents listed in subsection (2). They may also have regard to any international law or comparative law and any other document or matter they consider relevant. This will result in a draft of the proposal for publication and consultation.

Step 2 – publication and consultation

66. Once the proposal has been prepared, the Scottish Ministers must publish it and consult the people listed in subsection (3). Following that consultation, subsection (4) confirms that they may make changes to the proposal if they consider it appropriate. This confirms that the proposal may be refined in light of the consultation responses.

Step 3 – laying before Parliament, making and publication

67. Once at least 28 days have passed since the proposal was published under subsection (3), the Scottish Ministers may lay the proposal before the Scottish Parliament, at which point it is likely to be debated by the Parliament. It is only once the proposal has been laid that the Scottish Ministers may make the Scheme.

68. Once the Scheme has been made (or amended or replaced), the Scottish Ministers must publish it in such manner as they consider appropriate.

Section 16: Reviewing and reporting on the Scheme

69. Section 16 provides that the Scottish Ministers must review and report on the operation of the Scheme on an annual basis.

70. Each report is required to summarise the actions that the Scottish Ministers have taken to ensure that they have complied with the duty under section 6(1) (whether or not that action is done under arrangements set out in the Scheme) and to secure better or further effect of the rights of children. The report must also include a statement as to whether the Scottish Ministers will be amending or replacing the Scheme and any other specific actions that they might be taking in the coming year. The report may also include other matters that relate to the rights or wellbeing of children. For example, this may include action that the Scottish Ministers are taking in respect of any aspect of the UNCRC which has not been incorporated under the Act, so far as that action can be taken within devolved competence.

71. Subsection (2) lists things that, if they occur in the reporting period, must be taken into account during the review as these are significant events that are likely to require either changes to be made to the Scheme or specific actions to be taken in the coming year. The Scottish Ministers may also take into account international law and comparative law and any other document or matter they consider relevant in reviewing and reporting on the Scheme.

72. In deciding what actions for the coming year are to be included in the report, the Scottish Ministers must consult the people listed in subsection (5), that is: children, the Commissioner for Children and Young People, the Scottish Commission for Human Rights and anyone else that the Scottish Ministers consider appropriate. This latter element will allow for a wide range of civil society to contribute to the discussion.

73. Reports under the section are to be published and laid before the Scottish Parliament. The Scottish Ministers must also prepare and publish a version of the report for children.

Section 17: Child rights and wellbeing impact assessments

74. Section 17 requires the Scottish Ministers to carry out, and then publish, a child rights and wellbeing impact assessment in respect of provisions of primary and secondary legislation and decisions of a strategic nature that relate to the rights and wellbeing of children (as required by, and in accordance with, the arrangements set out in the Scheme). The purpose of such an

impact assessment 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. The Scottish Government has been preparing, and publishing, such impact assessments on a non-statutory basis since June 2015.

75. In relation to secondary legislation, the duty imposed by this section covers subordinate legislation made under both Acts of the Scottish Parliament and Acts of the UK Parliament, so long as it is a Scottish statutory instrument made by the Scottish Ministers (other than commencement orders or regulations). Acts of Sederunt and other court rules, statutory codes of practice, directions and guidance are not included here.

76. The requirement of the Scottish Ministers to carry out an impact assessment in respect of decisions of a strategic nature (subsection (3)) is intended to capture major policy decisions taken in relation to children's rights and wellbeing. The arrangements for carrying out, and publishing, such impact assessments are to be made in accordance with requirements set out in the Scheme.

77. Subsection (4) requires the Scottish Ministers to carry out and publish a child rights and wellbeing impact assessment in respect of:

- decisions to restrict school-age children's physical attendance at their usual school for reasons related to the SARS-Cov-2 virus (the Covid 19 pandemic was ongoing at the time this provision was included in the Bill for the Act), and
- any standards that education authorities have to apply when making any decision about temporarily stopping, or limiting, school-age children's access to their usual schools (whether they are making those decisions for reasons related to coronavirus or not).

78. The word "school" is defined for the purposes of subsection (4) by reference to the definition in the Education (Scotland) Act 1980 and so covers primary and secondary schools, special schools and nurseries.

Section 18: Reporting duty of listed authorities

79. Section 18 of the Act replaces the duty in section 2 of the Children and Young People (Scotland) Act 2014 ("the 2014 Act"). It requires the authorities which are listed in section 19 to prepare and publish reports on what they have done, and will do, to comply with the duty imposed by section 6(1) and to secure better or further effect of children's rights. The authorities must produce a version of these reports for children. After the first report (relating to the period ending 31 March 2026), the reports are required on a three yearly basis (as they were under the 2014 Act).

Section 19: Listed authorities

80. The list of authorities in section 19 includes all of the authorities listed in schedule 1 of the 2014 Act (plus the Scottish Courts and Tribunals Service). The Scottish Ministers may amend this list by regulations (which are subject to the affirmative procedure). Only bodies which are public authorities may be added to the list (for the meaning of public authority, see paragraph 35 above and sections 6(5) and (8) and 42 of the Act).

81. The Scottish Ministers must consult a public authority (or where appropriate, public authorities meeting a particular description) before the authority is (or authorities are) added to, or removed from, the list.

Section 20: Guidance on section 18

82. Section 20 requires the Scottish Ministers to issue guidance about how the authorities listed in section 19 are to carry out the reporting functions conferred on them by section 18. Before issuing guidance under section 20 for the first time, or issuing any revised guidance, the Scottish Ministers must consult children, the Commissioner for Children and Young People in Scotland, the Scottish Commission for Human Rights and such other persons as they consider appropriate.

Section 21: Reporting duty of the Scottish Parliament

83. Section 21 requires the Scottish Parliamentary Corporate Body (which provides the property, services and staff needed to run the Scottish Parliament) to publish an annual report on what the Scottish Parliament has done, and will do, to secure better or further effect of the rights of children. Neither the Scottish Parliament nor persons carrying out functions in connection with proceedings in the Parliament are public authorities within the meaning of section 6 and so are not subject to the duty imposed by section 6(1). As a consequence, reports under section 21 (in contrast to reports under sections 16 and 18) will not include information on what has been done to comply with the duty under section 6(1). A version of the report for children must also be produced.

Section 22: Consequential amendments of the Children and Young People (Scotland) Act 2014

84. Section 22 repeals Part 1 and schedule 1 of the 2014 Act. Section 1 of the 2014 Act has been replaced by the reporting duties included in section 16 and section 2 (and schedule 1) of the 2014 Act has been replaced by sections 18 and 19.

PART 4: LEGISLATION AND THE UNCRC REQUIREMENTS

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

- makes provision about the making of statements, in relation to primary and secondary legislation, about compatibility with the UNCRC requirements;
- provides that certain words (whenever enacted) in legislation made by, or by virtue of power conferred by, the Scottish Parliament are to be interpreted in a way that is consistent with the UNCRC requirements where possible;
- allows a court which finds that such words cannot be interpreted consistently with the UNCRC requirements to either (depending on when the incompatible words were enacted) strike the words down or declare them to be incompatible with the UNCRC requirements.

Section 23: Statements of compatibility in relation to legislation

86. Subsection (1) of section 23 requires all Public Bills introduced to the Scottish Parliament to be accompanied by a statement from the member introducing the Bill about the extent to which it is compatible with the UNCRC requirements. "Public Bill" is defined by Rule 9.1 of the Scottish Parliament's Standing Orders.

87. Subsection (2) creates an equivalent rule for a statement where the Scottish Ministers make a Scottish statutory instrument other than one bringing primary legislation into force. The phrase "Scottish statutory instrument" is defined by section 27 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 24: Interpretation of legislation

88. Section 24(1) requires that words in certain types of legislation must, if possible, be given an interpretation that is compatible with the UNCRC requirements. This interpretative obligation is analogous to the obligation created by section 3 of the Human Rights Act 1998, the effect of which has been the subject of judicial consideration in a number of cases (see for example Ghaidan v Godin-Mendoza [2004] UKHL 30).

89. The interpretative obligation under subsection (1) applies to the following:

- words in Acts of the Scottish Parliament to which section 29 applies, and
- words in subordinate legislation to which section 30 applies.

90. See paragraphs 114 to 121 below for further discussion of those sections. Broadly speaking, the interpretative obligation under subsection (1), as read with sections 29 and 30, only applies to words enacted by the Scottish Parliament, or enacted by virtue of the Scottish Parliament delegating its power to make legislation. Such words require, so far as it is possible to do so, to be read and given effect in a way that is compatible with the UNCRC requirements (while, for example, words inserted into an Act of the Scottish Parliament by an Act of the UK Parliament, do not).

91. Subsection (2) provides that the requirement to (so far as possible) read and give effect to legislation in a way that is compatible with the UNCRC requirements has no effect on the validity, continuing operation or enforcement of any incompatible Act of the Scottish Parliament or any incompatible subordinate legislation made by virtue of an Act of the Scottish Parliament (provided in the latter case that removal of the incompatibility is prevented by provision in that Act or in a UK enactment).

92. If a court finds it impossible to read words to which the interpretative obligation under subsection (1) applies in a way that is compatible with the UNCRC requirements, it can (depending on when the words in question were enacted) make a strike down declarator under section 25 or an incompatibility declarator under section 26.

Section 25: Strike down declarators

93. Section 25 allows a court to strike down certain words in legislation (see paragraphs 99 to 103 below) if it finds them to be incompatible with the UNCRC requirements, which necessarily means that the court was unable to find a way to interpret the words compatibly with those requirements in accordance with section 24.

Effect of striking down legislation

94. The effect of striking down words in legislation under section 25 is as follows:

- from the point at which they are struck down, the words no longer form part of Scots law. They are not, however, to be treated as never having formed part of Scots law and so anything lawfully done under the words before they were struck down is not rendered unlawful retrospectively.
- the Scottish Ministers' duty to make a statement to the Scottish Parliament under section 28 is triggered.

Suspension of effect of strike down

95. A court may, if it considers it appropriate to do so when making a strike down declarator, delay its taking effect so that, for example, the words can remain in force while steps are taken to remedy their incompatibility with the UNCRC requirements (subsection (5)). Steps to remedy an incompatibility may, for example, involve the Scottish Ministers amending the legislation in question through remedial regulations under section 39.

96. As there may be a call for remedial action to be taken ahead of legislation being struck down, and to ensure that before deciding to strike words down the court is appraised of the wider public interest ramifications, subsections (7) and (8) require that where a court is considering suspending the effect of a strike down declarator the Lord Advocate, who is the Scottish Government's senior law officer, be informed and given an opportunity to make representations to the court. If the Lord Advocate's involvement results in the litigation becoming more expensive than it would otherwise have been, section 38 allows the court to award expenses to the party who incurred them (whatever the outcome).

Courts that can strike legislation down

97. The power to make a strike down declarator is exercisable by:

- the Supreme Court of the United Kingdom,
- the Court of Session, which is Scotland's supreme civil court,
- the High Court of Justiciary, which is Scotland's supreme criminal court, but the High Court can only exercise the strike down power when it is not sitting as a trial court (which means it can do so when, for example, acting as an appeal court).

Procedure to be followed before striking down

98. Before making a strike down declarator the court must afford the Lord Advocate, the Commissioner for Children and Young People in Scotland and the Scottish Commission for Human Rights an opportunity to make representations (see section 27).

Words that are susceptible to strike down

99. Words in legislation are only susceptible to being struck down under section 25 if they are in either:

- a pre-commencement Act of the Scottish Parliament (in which case, section 29 also needs to apply to the words in order for them to be struck down), or
- subordinate legislation made by virtue of a pre-commencement Act of the Scottish Parliament (in which case section 30 also needs to apply to the words in order for them to be struck down).

100. See paragraphs 114 to 121 below for further discussion of sections 29 to 30. Broadly speaking, those sections ensure that only words enacted by, or by virtue of a power conferred by, the Scottish Parliament can be struck down (subject also to the qualifications set out in section 25 as to when the words must have been enacted in order to be susceptible to strike down).

101. Section 25(10) provides that, in order to be a pre-commencement Act of the Scottish Parliament, the Bill for the Act must have received Royal Assent before the day on which section 25 comes into force (so before 16 July 2024). In addition, the references to pre-commencement Acts of the Scottish Parliament in section 25 (and also section 26) are references to the Act in question as it stood on the day on which section 25 comes into force (so, for example, words inserted into the Act after the day section 25 comes into force cannot be struck down). Where incompatible words are words to which section 29 applies but which cannot be struck down under section 25 due to the Bill for the Act of the Scottish Parliament in which they appear having received Royal Assent on or after the day on which section 25 comes into force, or due to the words having been inserted into the Act on or after that date, a court may instead make an incompatibility declarator in relation to the words (see section 26).

102. Whereas words in Acts of the Scottish Parliament can only be struck down if enacted before section 25 comes into force, words in subordinate legislation are susceptible to being struck down whenever the subordinate legislation is made. Subordinate legislation, in this context, means subordinate legislation made by virtue of a pre-commencement Act of the Scottish Parliament (as discussed above). So, for example, words in regulations made by the Scottish Ministers in exercise of regulation-making powers contained in an Act of the Scottish Parliament enacted before section 25 comes into force could be struck down under section 25, despite the regulations themselves being made on or after the day section 25 came into force.

103. Section 25(3) sets out some additional limitations on when words in subordinate legislation may be struck down. Firstly, the Act of the Scottish Parliament by virtue of which the subordinate legislation is made must prevent removal of the incompatibility. Secondly, the words cannot be struck down if words in a UK enactment prevent removal of the incompatibility.

Section 26: Incompatibility declarators

104. Section 26 allows a court to declare certain words in legislation (see paragraph 108 below) to be incompatible with the UNCRC requirements, where it has found it impossible to interpret the words compatibly with those requirements in accordance with section 24.

105. An incompatibility declarator triggers the Scottish Ministers' duty to make a statement to the Scottish Parliament under section 28. Legislative words declared to be incompatible with the UNCRC requirements under this section remain the law unless and until legislative action is taken in relation to them.

106. The power to make an incompatibility declarator is exercisable by the same courts that can make a strike down declarator (see section 25(11) and paragraph 97 above).

107. Before making an incompatibility declarator the court must afford the Lord Advocate, the Commissioner for Children and Young People in Scotland and the Scottish Commission for Human Rights an opportunity to make representations (see section 27).

108. The words in legislation in respect of which an incompatibility declarator can be made are words which originate from the Scottish Parliament but which cannot be struck down under section 25, due to the time of their enactment. In other words, an incompatibility declarator can be made in respect of:

- words in a post-commencement Act of the Scottish Parliament (that is, an Act of the Scottish Parliament which received Royal Assent on or after the day on which section 26 came into force – so on or after 16 July 2024). Section 29 also needs to apply to the words in order for them to be declared incompatible.
- words inserted, on or after the day on which section 25 came into force (also 16 July 2024), into a pre-commencement Act of the Scottish Parliament (that is, an Act of the Scottish Parliament which received Royal Assent before that day). Again, section 29 also needs to apply to the words in order for them to be declared incompatible.
- words in subordinate legislation made by virtue of a power conferred by a post-commencement Act of the Scottish Parliament. In this case, section 30 also needs to apply to the words in order for them to be declared incompatible.
- words in subordinate legislation made by virtue of a power inserted, on or after the day on which section 25 came into force, into a pre-commencement Act of the Scottish Parliament. Again, section 30 also needs to apply to the words in order for them to be declared incompatible.

109. Section 26(3) sets out equivalent additional limitations on the power to declare words in subordinate legislation incompatible as are set out in section 25(3) in relation to the power to strike down incompatible words in subordinate legislation.

Section 27: Power to intervene in proceedings where strike down declarator or incompatibility declarator is being considered

110. Section 27 requires a court considering making a strike down declarator or an incompatibility declarator to afford the following persons an opportunity to make representations to it:

- the Lord Advocate, who is the Scottish Government's senior law officer,
- the Commissioner for Children and Young People in Scotland,
- the Scottish Commission for Human Rights.

111. If the involvement of those persons results in the litigation becoming more expensive than it would otherwise have been, section 38 allows the court to award those expenses to the party who incurred them (whatever the outcome).

Section 28: Ministerial action following strike down declarator or incompatibility declarator

112. Section 28 sets out what the Scottish Ministers must do in the event that a strike down declarator (under section 25) or an incompatibility declarator (under section 26) is made.

113. It requires the Scottish Ministers, within 6 months of the declarator being made, to:

- report publicly on what (if anything) they intend to do in response to the declarator;
- seek to make a statement to the Scottish Parliament on the matter (the Scottish Ministers do not control the scheduling of business in the Scottish Parliament and so can only seek to make a statement within the 6-month period).

Sections 29 and 30: Words in legislation to which Part 4 applies

114. The principal purpose of sections 29 and 30 is to ensure that sections 24 to 26 do not apply to legislation originating from the UK Parliament.[3]

115. One effect of this is to exclude (for example) any words in an Act of the Scottish Parliament which relate to reserved matters (or which are otherwise outside the legislative competence of the Scottish Parliament in terms of section 29(2) of the Scotland Act 1998). In order to be law, such words must have been inserted into the Act of the Scottish Parliament by legislation made by, or by virtue of power conferred by, the UK Parliament (meaning that section 29 would not apply to the words).[4] But UK legislation relating to devolved matters (whether enacted before or after the establishment of the Scottish Parliament in 1999) is also excluded from the application of sections 24 to 26, due to originating from the UK Parliament.

116. For the purposes of sections 29 and 30, words inserted, by legislation made by, or by virtue of power conferred by, the Scottish Parliament, into legislation originating from the UK Parliament are not considered to be "in" the Act of the Scottish Parliament or (as the case may be) Scottish statutory instrument which inserted them into the UK legislation. This is because the words are only ever operative as part of the UK legislation into which they are inserted. Such words are therefore considered to form part of the UK legislation into which they are inserted. This means that sections 24 to 26 do not apply in relation to (for example) a new section inserted by an Act of the Scottish Parliament into (for example) the Education

[3] This is in response to the Supreme Court judgment in the *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [2021] UKSC 42*), which found that sections 24 to 26, in the form in which they originally appeared in the "Bill as Passed" (in which they were numbered sections 19 to 21), were outside the Scottish Parliament's legislative competence – see the "Parliamentary history" section at the end of these Notes.

[4] This is because, under section 29(1) of the Scotland Act, an Act of the Scottish Parliament which purported to contain provision, enacted by the Scottish Parliament, relating to a reserved matter would not, to the extent it exceeded the Scottish Parliament's legislative competence, be law.

(Scotland) Act 1980, since the new section is considered to form part of the 1980 Act (which is excluded from the application of sections 24 to 26, due to having originated from the UK Parliament).

117. Following the same principle, words inserted, by legislation made by, or by virtue of power conferred by, the UK Parliament, into (for example) an Act of the Scottish Parliament do form part of that Act of the Scottish Parliament. But sections 29 and 30 ensure that sections 24 to 26 do not apply in relation to such words, as explained below.

Section 29: Primary legislation words to which this Part applies

118. The words to which section 29 applies are words in an Act of the Scottish Parliament – but only if they are in the Act because:

- they are the Act's original words (that is, they were included in the Bill for the Act when it was passed by the Scottish Parliament, rather than being inserted later),
- they are words inserted into the Act by the original words of another Act of the Scottish Parliament, or
- they are words inserted into the Act by subordinate legislation made under a power conferred by a provision which does not derive from an Act of the UK Parliament (essentially, therefore, words inserted by subordinate legislation made under a power conferred by the Scottish Parliament).

119. Words inserted into an Act of the Scottish Parliament by an Act of the UK Parliament, or subordinate legislation made under such an Act, are therefore not subject to the interpretative duty set out in section 24(1) (and so do not require to be read and given effect in a way that is compatible with the UNCRC requirements, whether that is possible or not). Such words also cannot be struck down under section 25 or declared incompatible under section 26.

Section 30: Subordinate legislation words to which this Part applies

120. Section 30 makes equivalent provision in relation to words in subordinate legislation to that made in relation to words in primary legislation by section 29. That is, for section 30 to apply to them, words must be contained in a Scottish statutory instrument originally made wholly or partly under a power conferred by a provision which does not derive from an Act of the UK Parliament (essentially, therefore, an instrument made wholly or partly under a power conferred by the Scottish Parliament). In addition, the words must be contained in the instrument:

- as a result of the exercise of a power conferred by the Scottish Parliament – although it does not matter whether the words were contained in the instrument as originally made or subsequently inserted into the instrument by a subsequent exercise of the same or a different power conferred by the Scottish Parliament, or
- as a result of being inserted into the instrument by words to which section 29 applies (so words inserted into the instrument by, for example, an Act of the UK Parliament would not count as words to which section 30 applies).

121. The effect of this is that words contained in a Scottish statutory instrument by virtue of the exercise of a power conferred by the UK Parliament (including where that power is exercised by the Scottish Ministers) or by virtue of being directly inserted by an Act of the UK Parliament are not subject to the interpretative duty set out in section 24(1) (and so do not require to be read and given effect in a way that is compatible with the UNCRC requirements). Such words also cannot be struck down under section 25 or declared incompatible under section 26.

PART 5: COMPATIBILITY QUESTIONS AND UNCRC COMPATIBILITY ISSUES

122. Part 5 makes provision for a system for the courts to consider compatibility questions (in civil proceedings) and UNCRC compatibility issues (in criminal proceedings) relating to the compatibility of legislation with the UNCRC requirements and public authorities' compliance with section 6.

Section 31: Meaning of "compatibility question"

123. Section 31 provides the definition of "compatibility question" for this Part. These are questions arising in civil proceedings as to whether words in legislation to which section 29 or 30 apply are compatible with the UNCRC requirements or whether a public authority has acted (or proposes to act) in a way which section 6 makes unlawful.

124. Subsection (2) excludes from the meaning of "compatibility questions" things that would otherwise meet the definition but which occur in criminal proceedings. Those are dealt with as UNCRC compatibility issues and are covered by section 32 instead.

125. Subsection (3) sets out that a compatibility question is not to be taken to have arisen in proceedings just because a party claims one has, if the court or tribunal thinks the party's contention is frivolous or vexatious.

Section 32: UNCRC compatibility issues in criminal proceedings

126. Section 32 provides the definition of "UNCRC compatibility issues" for this Part (see also section 42(1)). These are questions arising in criminal proceedings as to whether words in legislation to which sections 29 or 30 apply are compatible with the UNCRC requirements or whether a public authority has acted (or proposed to act) in a way which section 6 makes unlawful.

127. This section adds sections 288AB and 288AC to the Criminal Procedure (Scotland) Act 1995 to establish a system to allow lower criminal courts to refer UNCRC compatibility questions to the High Court and for the High Court to refer such questions to the Supreme Court. Where an issue is referred to the Supreme Court, the Supreme Court may only deal with the UNCRC compatibility issue and must remit the rest of the proceedings to the High Court. These sections allow the Lord Advocate to require a criminal court to refer an issue to a higher court.

Section 33: Power to institute proceedings to determine compatibility question

128. Section 33 allows the Lord Advocate to start new proceedings to determine a compatibility question.

Section 34: Power to intervene in proceedings where compatibility question arises

129. Where a compatibility question arises in a case, the court must notify the Lord Advocate, the Commissioner for Children and Young People in Scotland and the Scottish Commission for Human Rights (unless they are already a party to the case). They can then take part in the proceedings as if they were a party to the case.

130. If the involvement of those persons results in the litigation becoming more expensive than it would otherwise have been, section 38 allows the court to award those expenses to the party who incurred them (whatever the outcome).

Section 35: Reference of compatibility question to higher court

131. Section 35 makes provision in the civil courts similar to that added to the Criminal Procedure (Scotland) Act 1995 by section 32.

132. A court other than the Inner House of the Court of Session or the Supreme Court may refer a compatibility question which arises in a case before it to the Inner House. In the case of a tribunal from which there is no appeal, such a reference is mandatory.

133. The Inner House may refer such a question (other than one referred to it) to the Supreme Court.

134. An appeal from the Inner House's decision on such a reference is to the Supreme Court. Where there would not normally be an appeal to the Supreme Court from a determination of a compatibility question by the Inner House, such an appeal is possible with the permission of the Inner House or, if it refuses permission, the Supreme Court itself.

Section 36: Direct references to Supreme Court: compatibility question arising in proceedings

135. Where a compatibility question arises in proceedings, section 36 allows the Lord Advocate to require the court or tribunal to refer the question directly to the Supreme Court.

Section 37: Direct references to Supreme Court: compatibility question not arising in proceedings

136. Section 37 allows the Lord Advocate to refer a compatibility question to the Supreme Court even if it does not arise in proceedings. Where such a question relates to the proposed exercise of a function by a public authority, the Lord Advocate must notify the public authority in question. That authority may not then exercise the function in the way proposed until the reference to the Supreme Court has concluded.

Section 38: Additional expenses

137. Where a court or tribunal considers that a party to proceedings has incurred additional expense as a result of an intervention by the Lord Advocate, the Commissioner for Children and Young People in Scotland or the Scottish Commission for Human Rights under section 25(8), 27(2) or 34(2), the court or tribunal may award the whole or part of those expenses to the party who incurred them (whatever the decision on the compatibility question).

PART 6: REMEDIAL REGULATIONS

138. Part 6 empowers the Scottish Ministers to change the law, by regulations, in order to cure an incompatibility (or potential incompatibility) with the UNCRC requirements as defined by section 1. It sets out two processes for making such regulations, one that is normally to be followed and an alternative process where there is a need to act more quickly than the normal process would allow.

Section 39: Remedial regulations

139. Section 39 confers power on the Scottish Ministers to make remedial regulations. The power can be used for the following purposes, on condition that the Scottish Ministers consider that necessary or expedient and are satisfied that there are compelling reasons for making remedial regulations as distinct from taking any other course of action:

- to address an incompatibility (or potential incompatibility) between, on the one hand, the UNCRC requirements and, on the other, any provision of "affected legislation" (an Act of the Scottish Parliament, an Act of the UK Parliament or subordinate legislation made under either kind of Act, which would be within the legislative competence of the Scottish Parliament to make);
- to address an incompatibility (or potential incompatibility) arising from anything done by a member of the Scottish Government (members of the Scottish Government are identified in section 44(1) of the Scotland Act 1998).

140. Criminal offences can be created by remedial regulations. Subsection (4) provides that a fine imposed on a person convicted under summary procedure of an offence created by remedial regulations cannot exceed level 5 on the standard scale. The standard scale is set in section 225 of the Criminal Procedure (Scotland) Act 1995. At the time of the publication of these Notes, a level 5 fine is £5,000.

Section 40: Remedial regulations: procedure

141. Section 40 sets out the normal process for making remedial regulations under section 39. An alternative process is set out by section 41 for urgent situations.

142. Section 40 provides that remedial regulations are normally subject to parliamentary scrutiny by way of the affirmative procedure, which is set out in section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010. It means that the regulations cannot be made unless the Scottish Parliament approves a draft of them.

143. Section 40 provides for additional procedural requirements, beyond those of the affirmative procedure, to apply to remedial regulations. Subsection (2) requires the Scottish Ministers to carry out a consultation process before it lays draft remedial regulations before the Parliament to seek its approval under the affirmative procedure. The Scottish Ministers are to invite the public to make comments on the draft remedial regulations within a 60-day comment period. A day is not to be counted if the Parliament is dissolved (which is to say that the day falls during the election period between one session of the Parliament ending and the new one beginning following the election). Nor is a day to be counted if it is a day within a period of 5

or more days during which the Parliament is in recess (details of when the Parliament is in recess can be found on its website, its recesses typically coincide with school holidays in Scotland).

144. Only once they have carried out the consultation required by subsection (2) may the Scottish Ministers seek the Parliament's approval of draft remedial regulations under the affirmative procedure. Subsection (4) requires that, when it does so, the Scottish Ministers must lay before the Parliament alongside the draft regulations a document summarising the comments received during the consultation period and, if the draft regulations being laid before the Parliament differ from the draft of the regulations consulted on, a statement of how they differ and why.

Section 41: Urgent remedial regulations

145. Whereas section 40 sets out the normal process for making remedial regulations under section 39, section 41 sets out a special process for urgent cases. Under the section 41 process, remedial regulations can be made and come into force immediately but will cease to have effect if the Scottish Parliament has not approved them by resolution within a certain period of their being made. The section 41 process also requires consultation on the regulations and allows for the possibility of their being changed, or replaced, within that period.

146. The period within which remedial regulations must be approved by resolution of the Parliament if they are to remain in force is 120 days (subsection (8)), but subsection (10) creates a special rule about how those 120 days are to be counted. A day is not to be counted if the Parliament is dissolved (which is to say that the day falls during the election period between one session of the Parliament ending and the new one beginning following the election). Nor is a day to be counted if it is a day within a period of 5 or more days during which the Parliament is in recess (details of when the Parliament is in recess can be found on its website, its recesses typically coincide with school holidays in Scotland).

147. Immediately after making remedial regulations following the section 41 process, the Scottish Ministers must give notice of them to the public and the Scottish Parliament (subsection (2)). In giving notice of the regulations to the public, the Scottish Ministers must invite comment on them within a 60 day period (but those 60 days are to be counted in the manner described in the paragraph above in relation to the 120 day period).

PART 7: FINAL PROVISIONS

Section 42: Interpretation

148. Section 42 defines certain words and expressions used in the Act.

Section 43: No modification of the Human Rights Act 1998

149. Section 43 states that nothing in the Act modifies the Human Rights Act 1998.

Section 44: Rules of court

150. Section 44 makes provision about rules of court. It provides first of all that any existing power to make rules of court can be used to make provision for the purposes of the Act. It also provides that where the Act requires the giving of intimation or notice that is to be done as rules of court require.

Section 45: Regulations

151. Where a provision in the Act enables the Scottish Ministers to make regulations, section 45 sets out that this includes the power to make incidental, supplementary, consequential, transitional or saving provision, and different provision for different purposes. However this does not apply to commencement regulations under section 47, where provision is made in section 47(4) instead.

Section 46: Ancillary provision

152. Section 46 enables the Scottish Ministers to make ancillary provision, by regulations, to give full effect to the Act or any provision made under it. It includes the power to modify other enactments (including the Act itself).

153. Regulations under section 46 that amend the text of an Act are subject to parliamentary scrutiny under the affirmative procedure (as defined by section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010). Otherwise, they are subject to the negative procedure (as defined by section 28 of that Act).

Section 47: Commencement

154. Section 47 deals with when the Act's provisions come into effect as a matter of law.

155. Sections 42, 45, 46, 47 and 48 came into effect automatically the day after the day that the Bill for the Act received Royal Assent (so on 17 January 2024). The process by which a Bill becomes an Act of the Scottish Parliament is set out in section 28 of the Scotland Act 1998.

156. The rest of the Act's provisions take effect 6 months after Royal Assent – so on 16 July 2024 (unless brought into force earlier by regulations made by the Scottish Ministers under section 47(2)(b)).

Section 48: Short title

157. Section 48 states that the Act's short title is the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024.

PARLIAMENTARY HISTORY

158. The following is a list of the proceedings in the Scottish Parliament on the Bill for the Act and significant documents connected to the Bill published by the Parliament during the Bill's parliamentary passage. The Bill for the Act was the first Scottish Parliament Bill in respect of which a Reconsideration Stage took place. The Supreme Court judgment (*Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [2021] UKSC 42*) which gave rise to the Reconsideration Stage can be found here.

Proceedings and reports	***Reference***
Introduction	
Bill as introduced (1 September 2020)	SP Bill 80 (Session 5 (2020))
Explanatory Notes (1 September 2020)	SP Bill 80–EN (Session 5 (2020))
Financial Memorandum (1 September 2020)	SP Bill 80–FM (Session 5 (2020))
Policy Memorandum (1 September 2020)	SP Bill 80–PM (Session 5 (2020))
Statements on legislative competence (1 September 2020)	SP Bill 80–LC (Session 5 (2020))
Delegated Powers Memorandum (1 September 2020)	SP Bill 80–DPM (Session 5 (2020))
SPICe briefing (2 November 2020)	SB 20-71
Stage 1	
Equalities and Human Rights Committee (lead committee)	
Consideration in private (3 September 2020)	Meeting minutes (EHRiC/S5/20/15/M)
Consideration in private (8 October 2020)	Meeting minutes (EHRiC/S5/20/20/M)
Consideration in private (29 October 2020)	Meeting minutes (EHRiC/S5/20/21/M)
Evidence session (12 November 2020)	Official Report (cols. 1 to 52)
Evidence session (19 November 2020)	Official Report (cols. 1 to 51)
Evidence session (26 November 2020)	Official Report (cols. 2 to 60)
Evidence session (3 December 2020)	Official Report (cols. 1 to 20)
Consideration in private (10 December 2020)	Meeting minutes (EHRiC/S5/20/27/M)
Stage 1 Report (20 December 2020)	4th Report, 2020 (Session 5) (SP Paper 898)
Delegated Powers and Law Reform Committee	
Report on Bill at Stage 1 (9 December 2020)	73rd Report, 2020 (Session 5) (SP Paper 882)
Whole Parliament	
Stage 1 debate (19 January 2021)	Official Report (cols. 43 to 82, 96, 100 and 102) Minutes of proceedings
Stage 2	
Equalities and Human Rights Committee	
Marshalled List of amendments	SP Bill 80-ML (Session 5 (2021))
Groupings of amendments	SP Bill 80-G (Session 5 (2021))

Proceedings and reports	***Reference***
Consideration of amendments (11 February 2021)	Official Report (cols. 1 to 50) Meeting minutes (EHRiC/S5/21/4/M)
Other documents	
Bill as amended at Stage 2 (12 February 2021)	SP Bill 80A (Session 5 (2021))
Revised Financial Memorandum (3 March 2021)	SP Bill 80A-FM (Session 5 (2021))
Revised Delegated Powers Memorandum (4 March 2021)	SP Bill 80A-DPM (Session 5 (2021))
Revised Explanatory Notes (12 March 2021)	SP Bill 80A-EN (Session 5 (2021))
After Stage 2	
Delegated Powers and Law Reform Committee	
Report on Bill as amended at Stage 2 (16 March 2021)	17th Report, 2021 (Session 5) (SP Paper 986)
Stage 3	
Marshalled List of amendments	SP Bill 80A-ML (Session 5 (2021)
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Stage 3 debate (whole Parliament, 16 March 2021)	Official Report (cols. 51 to 124) Minutes of proceedings
Bill as passed (16 March 2021)	SP Bill 80B (Session 5 (2021))
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Statement by Deputy First Minister and Cabinet Secretary for Covid Recovery (whole Parliament, 6 October 2021)	Official Report (cols. 22 to 35)
Statement by Deputy First Minister and Cabinet Secretary for Covid Recovery (whole Parliament, 24 May 2022)	Official Report (cols. 11 to 24)
Statement by Cabinet Secretary for Social Justice (whole Parliament, 27 June 2023)	Official Report (cols. 21 to 33)
Letter from Cabinet Secretary for Social Justice to Convener of Equalities, Human Rights and Civil Justice Committee (13 September 2023)	Correspondence on United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill
Debate on motion to reconsider the Bill (whole Parliament, 14 September 2023)	Official Report (cols. 62 to 76 and 120) Minutes of proceedings
Reconsideration Stage	
Equalities, Human Rights and Civil Justice Committee	

Proceedings and reports	***Reference***
Written submissions	Correspondence on United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill
Evidence session (31 October 2023)	Official Report (cols. 2 to 48) Meeting minutes
Evidence session (7 November 2023)	Official Report (cols. 26 to 44) Meeting minutes
Letter from Convener to Cabinet Secretary for Social Justice (17 November 2023)	Correspondence on United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill
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Marshalled List of amendments	SP Bill 80B-ML (Session 5 (2023))
Groupings of amendments	SP Bill 80B-G (Session 5 (2023))
Reconsideration Stage debate (7 December 2023)	Official Report (cols. 59 to 92) Minutes of proceedings
Other documents	
Bill as approved at Reconsideration Stage (7 December 2023)	SP Bill 80C (Session 5 (2023))
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Royal Assent (16 January 2024)	United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 (asp 1)

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