JustRight Scotland's Written Evidence to the Equalities and Human Rights Committee United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill

October 2020

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

Introduction

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

We warmly welcome this Bill to incorporate the United Nations Convention on the Rights of the Child ("UNCRC") into Scots law. The UNCRC is an international legal instrument of special significance. Its 54 articles set out the civil, political, economic, social and cultural rights that all children are entitled to regardless of their ethnicity, gender, religion, language, abilities or any other status. It is the most widely ratified of all the international human rights instruments.

It has now been 29 years since the UK ratified the UNCRC. It has also been 22 years since the European Convention on Human Rights ("ECHR") was incorporated into UK and Scots law through the Human Rights Act 1998 ("HRA") and the Scotland Act 1998 ("SA"). However, the timing of this Bill is particularly vital as it comes at a time where the UK is on the verge of a rights regression. Our human rights legal frameworks are being weakened and the means by which individuals can secure and protect their

rights are under threat. The Charter of Fundamental Rights of the European Union – the most comprehensive international human rights treaty in the world – has already been erased from our legal landscape. The current UK government was elected on a manifesto of "updating" the HRA, and it has been a long-standing policy aim of the governing party to repeal the HRA. The UK government has also pledged to "examine" the use of Judicial Review as a remedy to ensure it is not "abused". The challenge is therefore on two fronts: (1) the substance of the rights must be protected, and (2) the means by which we enforce them must be effective and accessible to all children in Scotland.

In the face of this challenge, we are encouraged that the Scottish Government has committed to the incorporation of the UNCRC and indeed a number of other international human rights treaties. The Scottish legal landscape is ancient and distinct from the other nations within the UK. With political will, there is the legal power for rights progression. We believe this Bill will improve the lives and the legal protections for children and young people living in Scotland, as well as their families.

On 12 November 2020, the head of our Scottish Refugee & Migrant Centre, Andy Sirel, will be giving oral evidence to the Equalities and Human Rights Committee. This written evidence, further to our response to the Scottish Government's Consultation, is a summary of our position on the proposals in the Bill.

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

Yes. In our consultation response we referred to what could be termed "upstream" measures as well as "downstream" measures. Upstream measures are procedural, positive obligations to pay "due regard" to the UNCRC in the formulation of legislation and policy. Downstream measures include judicial mechanisms which hold to account actions of public authorities and legislation to ensure rights-compliance.

It is clear to us that the Bill includes robust upstream and downstream measures. The upstream measures are the inclusion of the Children's Rights Scheme (sections 11-13), the Child Rights and Wellbeing Impact Assessments ("CRWIA") (section 14) and reporting duties on listed authorities (sections 15-16). These measures increase transparency around law and policy-making but also give children an opportunity to contribute and be heard in the process. The fact that there is specific reference to children participating in the making of decisions that affect them (section 11(3)) is encouraging, although we note that it is phrased as "may" instead of "shall". We believe making it mandatory, at least in all but urgent circumstances, to engage with children and young people would truly widen access.

The most access-widening aspect of the Bill, however, is the possibility for children to bring judicial proceedings for unlawful acts and obtain a remedy. Part 2 of the Bill brings multiple advantages in terms of widening access:

- For the first time, it is unlawful for public authorities to act incompatibly with the UNCRC rights contained at Schedule 1 of the Bill (section 6). Importantly, some of these rights go beyond existing rights already protected by the ECHR. For example, Article 8 UNCRC specifically protects a child's identity and Article 12 UNCRC enshrines a right to participate in all matters affecting the child. This constitutes rights progression.

- In section 7, there appears to be three areas of substantial progress in widening access to rights for children. The first is that, as per the Policy Memorandum to the Bill at paragraph 132, the question of who has standing to bring proceedings appears to be wider than current arrangements under the HRA. As we note below, we believe that the Bill would benefit from clarity on this point, but if the Policy Memorandum is to be relied upon, then the requirement for "victim status" is not included (as it is in the HRA model). "Victim status" in the HRA model is defined in terms of Article 34 ECHR. In effect, this means that we require to be instructed by a child, or someone else deemed a "victim" of a particular alleged violation, in order to bring proceedings. This is a barrier to accessing justice. At JRS we work with children and young people who are survivors of torture, sexual violence, and human trafficking, amongst other abuses. Almost all are unaccompanied and many suffer complex trauma-related mental health difficulties. It can be challenging for any child to instruct a lawyer to bring proceedings, but our client group are particularly disadvantaged in this regard. Other issues like capacity may affect the ability to instruct as well. Section 7 – if it functions as it ought to – allows actions to be taken by a single or collaboration of organisations with "sufficient interest", without the requirement for vulnerable persons to go through a court process. This element also allows preventative steps to be taken to protect children's rights before the damage of an unlawful act – or many unlawful acts - is done.

- The second area of progress is the specific power for the Children and Young People's Commissioner Scotland ("the Commissioner") to either bring proceedings or intervene in proceedings (section 10). We have already highlighted above why it is positive that the Commissioner can bring proceedings on behalf of a child or young person. The ability for the Commissioner to intervene in proceedings helps widen access for children because, through the Commissioner, children can have their views directly heard in litigation which affects them. Part of the Commissioner's role is to work with children and young people and take their views on the laws, policies and actions which affect their lives. With an intervention power, the Commissioner can provide this insight directly into a court proceeding.

- The third area is the positive approach to the time-limits for bringing proceedings (section 7(7)-(11)). In our work we often require to use Judicial Review ("JR") as a remedy in order to enforce our client's rights. A time-limit of 3 months from an unlawful act for a child or young person to access and instruct a lawyer, apply for and obtain legal aid, instruct an Advocate, and lodge a Petition for JR, is highly challenging. We work with children and young people, many of whom do not speak English and require interpreters, and some of whom are survivors of complex trauma, live with disability, and have health difficulties or capacity issues which are barriers to a lawyer. The provisions at sections 7(7)-(11) actively reduce the risk of a child or young person being unable to bring proceedings due to a time-bar issue.

In order to maximise the positive impact of the above provisions, we believe that implementation of the Bill must ensure effective access to legal aid for children seeking to bring proceedings under the Bill. Accessible, free legal advice is a fundamental aspect set out in the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice. We also note that General Comment No.20 states:

"The measures [on the right to be heard and participate] should be accompanied by the introduction of safe and accessible complaint and redress mechanisms with the authority to adjudicate claims made by adolescents, and by access to subsidized or free legal services and other appropriate assistance."

At present, the legislation and guidance around legal aid can be restrictive. For instance, it is our experience that care leavers in education in Scotland who receive the 'Care Experienced Bursary' have their bursary counted towards their income. This brings them to within £50 of the income eligibility limit and a low-wage part-time job can render them ineligible. It cannot be in accordance with the intention of the Bill that separated children and young people in care cannot access advice and assistance using legal aid, by virtue of an income stream relating to their care experience. We would recommend working constructively with the Scottish Legal Aid Board to ensure that the provision of legal aid is able to facilitate children's access to their rights under the Bill.

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

The UN Committee on the Rights of Child stated in its General Comment No.5 at paragraph 20:

"Incorporation should mean that the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice."

Without this ability included in the Bill, children would be unable to enforce their UNCRC rights under law. It is a cornerstone aspect of international human rights law that an effective remedy is available to address a rights violation.[1]

We work with children in the care system, unaccompanied asylum-seeking children and child victims of trafficking. As such, local authorities and the police are the main duty holders (in addition to the Home Office). At present we can raise UNCRC rights in the course of legal proceedings as part of a persuasive argument but they are not enforceable. In our view, this is a significant shortfall in the overall rights protection framework for these vulnerable children and young people which must be addressed as part of the legacy/outcome/impact of this Bill .

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

Section 4 - Interpretation of UNCRC requirements

We recommend that section 4 of the Bill includes a more expansive list of interpretative sources for the Scottish courts.

The Policy Memorandum at paragraph 144 states that "*the Scottish Government considers that it is imperative to make clear on the face of the Bill that the rights and obligations being incorporated remain within their context in the whole UNCRC and optional protocols as a matter of international law*" (emphasis added). The policy intention for including the interpretative sources cited in section 4(2) appears to be ensuring that the rights set out in Schedule 1 are read and interpreted in context by the courts.

We believe that the UNCRC General Comments, Concluding Observations and opinions made by the Committee in relation to Optional Protocol 3 explicitly serve this purpose. As such, they should be included in section 4.

The UNCRC, as with other international human rights treaties and constitutional documents, is a "living instrument". The scope of rights develop as time passes and societal attitudes develop. This is an aspect of human right law which is readily accepted by our courts in the application of the HRA. In the HRA context, it is the European Court of Human Rights which provides ongoing interpretative guidance on the ECHR rights, and the courts under section 2 HRA "take account" of, amongst other things, any judgment, decision, declaration or advisory opinion of that court. With regard to the UNCRC, it is the General Comments, Concluding Observations and opinions made by the Committee in relation to Optional Protocol 3 which give this direction. If the policy intention is to ensure the context of the rights in Schedule 1 is properly understood by the courts, then it follows that the courts should be encouraged

[1] UN Human Rights Council, Resolution 25/6, 'Rights of the child: access to justice for children'

to take account of these critical sources. As we indicated in our Consultation response, the Scottish judiciary is skilled at this exercise and we have every confidence that it will deftly use these interpretative sources to apply the Schedule 1 rights as it sees fit. To do so ensures that Scotland keeps pace with, or indeed leads, international law and practice with respect to children's rights.

Section 6 – Definition of a Public authority

We believe that the definition of a "public authority" in section 6 requires amendment to ensure it fully captures private entities engaged by public authorities.

We welcome the express statement at paragraph 123 of the Policy Memorandum which makes clear that the definition *"include[s] so-called "core" public authorities such as local authorities and health boards, but also other bodies, such as private bodies, when they are exercising functions of a public nature"*. It is worth noting that this is in accordance with the wording of Article 3 UNCRC which purposely includes "private" bodies.

We have sympathy with the drafters in addressing the question of what constitutes a "public authority" in section 6 of the Bill. It is clear that it is drafted widely, based on the HRA definition, with deference paid to 20 years of case law which the Policy Memorandum calls "*a helpful and stable basis on which to base the definition in the Bill.*"

Nevertheless, alongside colleagues such as Together Children's Alliance ("Together") and the Scottish Human Rights Commission ("SHRC"), we respectfully disagree that the case law is helpful and stable and so a more explicit approach to the definition is required.

To give a Scots law example, the matter was considered in detail by the Outer House of the Court of Session in *Ali (Iraq) v Serco [2019] CSOH 34* and by the Inner House in *Ali (Iraq) v Serco Ltd [2019] CSIH 54*. The question was whether Serco constituted a "public authority" for the purposes of the HRA when it was contracted by the Home Office to provide asylum accommodation to those seeking protection in the UK. The two courts came to opposing conclusions. What the two courts did agree on was that there was no "*single test of universal application*" which can be applied to the question of whether a function is public in nature (Inner House, para 53). This conclusion comes after the benefit of 20 years of litigation and two leading House of Lords cases (*Aston Cantlow v Wallbank [2003] UKHL 37* and *YL v Birmingham City Council [2007] UKHL 27*). It follows therefore that the existing case law is not definitive on this issue.

We would recommend that the agreements and disagreements between the Outer House and the Inner House in the *Ali v Serco* cases be studied. We believe that inspiration can be drawn from the "*factor-based approach*" used by the Lord Ordinary in the Outer House (Outer House, paras 30-32), which was supported in the House or Lords cases *Aston Cantlow v Wallbank* and *YL v Birmingham City Council*. We respectfully favour this approach over the Inner House approach, which made a

"*fundamental distinction*" between the public authority charged with public law responsibility, and the private operator which contracts to provide the service (Inner House, para 54). However, our point remains that the fact the two courts disagreed on how to define a public authority demonstrates that the issue is fraught with difficulty.

The reason this is of such vital importance is this: public authorities contracting out the delivery of services is a common practice in the children's sector. There are children's units and foster placements, caring for the most at-risk children in our society, which are private entities. There are leaving-care services operated by charities, contracted out from social work departments. For the avoidance of doubt, we use these as examples only; we are not casting any aspersions on those entities or the practice more generally. However, if the Inner House approach was applied to these relationships in Scotland – focusing on the "*fundamental distinction"* and the contracts governed by private law – they may not fall within the scope of the Bill. This leaves a serious, and potentially highly dangerous, accountability gap. It represents an access to justice issue.

A potential solution may be found in an assessment of the Joint Committee of Human Rights (JCHR) reports of the 2003-04 and 2006-07 sessions. We endorse the SHRC's expert view that favours the JCHR wording referencing "*a contract or other arrangement with a public authority which is under a duty to perform the function*". This would provide clarity that the public authority and its contractors must abide by the provision in section 6 of the Bill. Clarity in this regard is of course beneficial to children and young people and their families, but also public authorities and the private and third sector entities with whom they contract.

Of course, it is hoped that the various upstream measures in the Bill, including the reporting requirement, make it incumbent upon public authorities to ensure that their procurement services comply with their obligations under the Bill.

Section 7 - Proceedings for unlawful acts - Standing

We have set out above our highly positive view of section 7 and the Policy Memorandum's position on standing to bring proceedings. We note that "victim status" is not required and that the requirement is for "sufficient interest", as applied for example in JR proceedings through section 27B(2)(a) of the Court of Session Act 1988. We note that what constitutes "sufficient interest" is dependent on the context of the case and the considerations are found in case law (e.g. *AXA General Insurance Limited and others v The Lord Advocate and others [2011] UKSC 46* and *Walton v Scottish Ministers [2012] UKSC 44*).

We do not go as far as to suggest that the Bill should put forward a detailed definition as to what "sufficient interest" means. To do so may prove overly restrictive and become outdated. However, we are also cognisant – as we highlighted in our introduction – that the use of remedies like JR is under negative scrutiny at this moment in time. We believe there is a risk that standing to bring JR proceedings and perhaps other remedies becomes limited. We would ask the committee to consider

expressly inserting the “sufficient interest” requirement into the face of the Bill, with a view to future-proofing the Bill and protecting the use of the remedies it delivers.

4. **If you work for an organisation or public authority, what resources do you need to help children and young people access their rights? Will you require additional resources or training to implement the Bill, for example to make or respond to challenges in court?**

We are an organisation which provides a child-centred, trauma-informed legal service to children and young people across specialist areas of law. These include immigration, gender-based violence, anti-trafficking, and disability and trans discrimination. Children and young people, particularly those affected by violence, trauma or discrimination, deserve a legal service which is tailored to their needs. Our experience tells us that children are able to engage and instruct lawyers best when care is taken to ensure that they understand the law and have built a bond of trust with their legal representative. This takes time. We call this an enhanced legal service. We access legal aid for our clients, but legal aid provides only a minimum amount to carry out the basic necessary legal work. It does not provide enough to deliver the enhanced legal service these children and young people need for their complex legal cases. We have traditionally relied on private charitable trusts to provide project funding in order to cover the additional costs.

This Bill represents a significant widening in access to rights for children and young people in Scotland. In order to ensure that this access is real and effective, there requires to be resource dedicated to the legal and advice sector to enable practitioners to meet the need. Furthermore, this represents an opportunity to upskill the legal and advice sector in how to effectively work with children and young people, thus creating a child-friendly path of access to justice.

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

We have raised issues above around legal aid and the funding of the legal and advice sector. Without a child-friendly, accessible advice sector then the rights will remain on the page without achieving real impact in the lives of children in Scotland.

More broadly, we refer back to our comments in the introduction regarding the rights regression taking place in the UK. We believe this challenge must be met with a robust and strategic response which understands the intersectionality of rights abuses and is informed by frontline experience of how multiple layers of discrimination can compound and accelerate inequality, exclusion and disadvantage.

We agree with the submission of Together in this respect and we echo their call for the incorporation of the other international human rights treaties being looked at by the

National Taskforce for Human Rights Leadership. Children's rights, disability, race, gender, and economic disadvantage are interconnected. We see in our work how abuses like exploitation cut across all of these areas. By incorporating and implementing these treaties, we achieve a more comprehensive and holistic protection framework for our children and young people.

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

For the reasons outlined in our Consultation response we believe that it is entirely proper to have the Scottish courts adjudicate on whether a provision of an Act of the Scottish Parliament ("ASP") is incompatible with the rights secured in the Bill. The UNCRC General Comment No.5 states that "*Incorporation should mean that…the Convention will prevail where there is a conflict with domestic legislation or common practice*."

We welcome the availability of the "strike down" power for legislation which predates the coming into force of the Act. Again, as we have stated in our Consultation response, it is a stronger remedy than the declaration of incompatibility set out in section 21 of the Bill, although we appreciate the reasoning behind the distinction contained in the Bill.

7. What are your views on the Child Rights Scheme and the requirement on public authorities to report?

We are in support of these aspects of the Bill. We support the submission of Together as regards the specifics of the Scheme, the CRWIAs and the reporting duty. We have already stated our view on the use of the word "may" instead of "shall" in section 11(3) in the context of widening access.

The importance of these provisions cannot be underplayed. If policy and law is made in a manner which requires full and meaningful consultation with children and young people, and carefully, holistically assesses the impact on rights and welfare of children and their families, then it is less likely that acts and legislation will fall foul of the UNCRC in practice. A broad rights-based approach is embedded, a rights-compliant culture is cultivated, and litigation is reduced.

8. Is there anything else you want to tell us about the Bill?

We would add that we welcome Article 1 of Schedule 1 of the Bill which unequivocally states that a child is a person under the age of 18 years old. This, in our view, has long been a problematic area of Scots law. Some aspects of Scot law defines a child as under 16-years old (e.g. section 199 of the Children's Hearings (Scotland) Act

2011). For the avoidance of doubt, we acknowledge the aspirational intention behind defining a child as under 16 in some circumstances. However, it is the case from our experience that there exist legal and practice gaps whereby children who are 16 and 17-years old receive a lesser standard of protection by virtue of this legal distinction. This problem is particularly acute for our client group, where we work with 16 and 17-year olds at risk of exploitation and abuses like forced marriage and FGM. We look forward to seeing these matters addressed in light of the clear legal and policy direction taken in this Bill.

END

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