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# Incorporating International Human Rights: The Implications of the UNCRC (Incorporation) (Scotland) Bill Reference for the Scottish Human Rights Bill

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## SUMMARY

The proposed Scottish Human Rights Bill<sup>2</sup> will incorporate into Scots law four international human rights treaties – the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the International Convention on the Elimination of All Forms of Racism, and the Convention on the Rights of Persons with Disabilities – as well as creating a freestanding right to a healthy environment. **The Scottish Parliament has the power to legislate to enhance human rights protection in Scotland, and to incorporate international treaties, but it must do so in a way that respects the limits of devolved competence.**

The Supreme Court's decision in the *United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* Reference highlighted particular, and unexpected, problems for devolved human rights legislation stemming from s.28(7) of the Scotland Act 1998. The Court held that s.28(7), which preserves the unconditional right of the UK Parliament to legislate for Scotland, meant that the duties imposed by the UNCRC Bill could not extend to UK legislation, even if it dealt with devolved subject matters. **As a consequence, the scope of the Bill had to be very considerably narrowed before it could become an Act, and its operation has become more complicated as a result.**

**If the same approach is taken to the Scottish Human Rights Bill, important pieces of legislation affecting the rights incorporated by the Bill will also be beyond the scope of its duties.** This is because much of the legislation affecting devolved public functions still dates from before devolution. Even if such legislation has subsequently been amended by the Scottish Parliament, it will still be likely to fall outwith the scope of the Scottish Human Rights Bill.

This paper considers ways in which the scope of the Scottish Human Rights Bill could be extended to ensure maximum coverage of the incorporated rights within devolved policy areas. The best way of doing so would be **amend the Scotland Act** to make clear that s.28(7) does not limit the ways in which the Scottish Parliament can legislate to protect human rights. If Holyrood's legislative competence remains unchanged, the precise nature of the restrictions imposed by s.28(7) are not entirely clear, so creating an element of legal risk. Nevertheless, there may be **options for drafting the Scottish Human Rights Bill differently** so as to extend duties to UK legislation and/or public functions created by such legislation. A third set of options considered in the paper concerns ways of **bringing existing UK legislation within the scope of the Scottish Human Rights Bill**, for instance, though consolidation and re-enactment as Acts of the Scottish Parliament, and recommendations for ensuring that future legislation in devolved areas will be subject to the incorporated rights.

## INTRODUCTION

The proposed Scottish Human Rights Bill<sup>3</sup> seeks to incorporate into Scots law four international human rights treaties – the International Covenant on Economic, Social and Cultural Rights (**ICESCR**), the Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**), the International Convention on the Elimination of All Forms of Racism (**CERD**), and the Convention on the Rights of Persons with Disabilities (**CRPD**) – as well as to create a freestanding right to a healthy environment.

The Bill will do so broadly on the model adopted in the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 (the “UNCRC Bill/Act”), which in turn is modelled on (though not identical to) the Human Rights Act 1998. In other words, it will impose:

- **Duties on the courts** to interpret legislation compatibly with the rights incorporated by the Bill where possible, and permit them to strike down or declare incompatible legislation which is in breach of those rights (“interpretive duties”);
- **Duties on public authorities** to take account of, and in some circumstances to comply with, the incorporated rights when exercising their statutory and other functions, as well as a range of supporting obligations, such as to report on actions taken to comply with the rights (“compatibility duties”);
- **Corresponding rights for individuals** and others to enforce the incorporated rights in the courts (as well as through other mechanisms, such as the Scottish Public Services Ombudsman (SPSO)).

The powers of the Scottish Parliament to make legislation are limited by the terms of the Scotland Act 1998. There are two general categories of limits on devolved competence:

1. The reservation of certain policy areas to the UK Parliament – the Scottish Parliament cannot enact legislation which “relates to” such reserved matters;
2. Limitations which affect the kind of legislation that can be enacted within devolved policy areas.

Legislation which is in breach of these limits can be challenged in the courts.<sup>4</sup> The UK or Scottish Government Law Officers may refer a Bill to the Supreme Court before it receives Royal Assent; or once it has become an Act, it may be challenged in a wide range of court proceedings by anyone affected by or who has an interest in it. If provisions are found to exceed the Scottish Parliament’s competence, they are “not law” – i.e., they can be struck down by the courts. Although there will be an opportunity to amend the legislation to bring it within competence, this is not always easy to achieve, and at a minimum a legal challenge – whether successful or not – can cause significant delay and uncertainty in implementing the legislation. There is therefore a strong incentive for the Scottish

Government to avoid the risk of legal challenge by ensuring that Bills are within devolved competence, but it is not always possible to be certain about how the courts will react to particular challenges.

As far as the proposed Human Rights Bill is concerned, it is clear that the Scottish Parliament has power to legislate to enhance protection of human rights in Scotland, and to incorporate international human rights treaties into Scots law. Although the Human Rights Act 1998 is a protected statute which Holyrood may not “modify”, this does not prevent it from legislating to supplement the protections for human rights contained in that Act. In addition, while foreign affairs are in general reserved to Westminster, there is a specific exception for “observing and implementing international obligations”.

However, several other competence limits have to be borne in mind in developing this Bill:

1. In general, duties imposed by the Bill cannot affect reserved policy matters;<sup>5</sup>
2. Particular challenges are created by the Equal Opportunities reservation for the incorporation of the three “group rights treaties” (CEDAW, CERD, and CRPD);
3. The Bill must not “condition” the exercise of the UK Parliament’s continuing unlimited power to legislate for Scotland (including on devolved matters), contrary to s.28(7) of the Scotland Act.

This paper focuses on the implications of the last of these limitations, in light of the Supreme Court’s decision that the UNCRC Bill as originally passed by the Scottish Parliament breached s.28(7).<sup>6</sup> The UNCRC Bill therefore required significant amendment before it could become an Act. The strong likelihood is that the Scottish Government will adopt the same approach to the Human Rights Bill as to the amended UNCRC Act.

This paper will discuss: first, the nature of the limitation that s.28(7) imposes on devolved law-making; second, the effect of the amendments to the UNCRC Bill and the likely implications for the Human Rights Bill; and third, potential means of overcoming the limitations imposed by s.28(7).

### The Effects of Section 28(7) of the Scotland Act 1998 on Devolved Legislative Competence

Section 28(7) states that, despite the power of the Scottish Parliament to make laws in devolved areas, this “*does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.*”

**For many years this was understood simply as a symbolic restatement of the sovereignty of the UK Parliament.**

Parliamentary sovereignty means that Westminster has continuing power to legislate in devolved areas, to amend or repeal Acts of the Scottish Parliament, and to alter the Scottish Parliament’s powers, or

even to abolish it altogether. In other words, s.28(7) acted as a reminder that the powers of the Scottish Parliament were not constitutionally secure.

**Since 2018, however, it has been fashioned by the Supreme Court, in response to arguments made by the UK Law Officers, into an additional – and wholly unexpected – limit on Holyrood’s law-making power.**

The issue first arose in the *Continuity Bill Reference*,<sup>7</sup> in which the Supreme Court held that s.17 of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill was an **unlawful modification of s.28(7)**. Section 17 provided that where UK Ministers were exercising certain powers conferred by UK legislation to make regulations affecting devolved matters, they would have to obtain the consent of the Scottish Government in order for the regulations to take effect. The Supreme Court’s reasoning was as follows:

1. S.28(7) is one of the provisions in the Scotland Act which Holyrood is not permitted to modify (a “protected enactment”);
2. Modification includes not only express amendment or repeal, but anything which is in substance “in conflict with the unqualified continuation in force” of the protected enactment;
3. Although Westminster could repeal or disapply s.17 of the Continuity Bill, the

existence of the provision would nevertheless “condition” the exercise of the UK Parliament’s power to legislate for Scotland which, according to s.28(7), is unconditional.

**This reasoning was then applied in the UNCRC (Incorporation) Bill Reference.** As the UNCRC Bill had been passed by the Scottish Parliament, the duties placed on the courts and public authorities applied to all legislation in devolved areas, whether made by Holyrood or Westminster. The Supreme Court held, once again, that these duties would condition the UK Parliament’s law-making power by altering the meaning to be given to UK Acts, or by exposing Westminster to public pressure if its legislation were found to be incompatible with the UNCRC. The interpretive and compatibility duties in the UNCRC Bill were therefore declared to be outwith devolved competence so far as they applied to UK legislation.

The decisions in these two cases have been subject to trenchant academic criticism<sup>8</sup>.

First, the reasoning seems **incoherent**. Since Holyrood has undoubted power to directly amend or repeal UK legislation in devolved areas, it is difficult to understand why this cannot also be done indirectly, by subjecting it to general conditions.

Secondly, the decision in the UNCRC (Incorporation) Bill Reference creates significant **practical difficulties**, because

UK and Scottish legislation in devolved areas is not easily disentangled.

Thirdly, there is considerable **uncertainty** about the extent of the restriction s.28(7) imposes on devolved law-making power. Potentially, it is very broad indeed, and again it is difficult to draw clear distinctions between the provisions struck down in these two cases and provisions in earlier devolved legislation which have not been challenged. Discussions between the Scottish and UK Governments over amendments to the UNCRC Bill suggest that UK Government lawyers are taking a broad view of the implications of s.28(7), raising objections beyond those specifically raised before the Supreme Court.

Despite these problems it is unlikely that the Supreme Court will change its mind on the effect of s.28(7), unless the Scotland Act is amended. The current UK Government was not prepared to make any such amendments, or to use other powers under the Scotland Act, to enable the UNCRC Bill to be enacted in its original form.<sup>9</sup> A future UK Government may take a different view, but it cannot be assumed that it will do so.

### Reconsideration of the UNCRC Bill and Its Implications for the Scottish Human Rights Bill

#### *UNCRC Bill Reconsideration*

In order for the UNCRC Bill to become an Act, it had to be amended by the Scottish Parliament at a “reconsideration” stage, in

order to address the competence issues in the Supreme Court’s decision. Amendments were eventually made on 7 December 2023, and the Bill received Royal Assent on 16 January 2024 (nearly three years after it had first been passed by MSPs).

In developing suitable amendments to the Bill, the Scottish Government was motivated by two main considerations: first, to avoid a further Supreme Court reference; and second, to reduce complexity for users of the legislation, as far as possible. As a consequence, the amendments actually made may have gone beyond what was strictly required by the Supreme Court’s decision.

As amended, the **interpretive duties in the UNCRC Act** (ss. 24 – 26) apply to:

- Acts of the Scottish Parliament (“ASPs”) (subject to the exceptions below);
- Scottish Statutory Instruments (“SSIs”) – i.e., regulations made by Scottish Ministers – made under powers contained in ASPs.

The interpretive duties *do not* apply to:

- Acts of the UK Parliament dealing with devolved subject matters, whether enacted before or after devolution;
- Amendments made to UK Acts by ASPs;
- Amendments made to ASPs by UK Acts;
- SSIs made under powers conferred by UK Acts.

Similarly, the **compatibility duty in the UNCRC Act** (s.6) applies to public functions in devolved areas which are conferred by:

- ASPs (subject to the exceptions below);
- SSIs, where the power to make regulations is contained in an ASP, or has been inserted into a UK Act by an ASP;
- Rules of the common law.

The duty *does not* apply to devolved public functions conferred by:

- UK Acts;
- Amendments made to UK Acts by ASPs;
- SSIs made under powers conferred by UK Acts;
- ASPs which have been amended by UK Acts, where the amendment requires or entitles the public authority to act incompatibly with the UNCRC.

As a result of these amendments, the UNCRC Act is more problematic than the Bill as originally passed in three main respects.

First, while the original Bill sought a maximalist approach to protection of UNCRC rights within devolved competence, the scope of the final Act is significantly **narrower**. Major aspects of the law relating to children are still found in pre-devolution Acts of the UK Parliament, and so these are now not subject to the duties imposed by the UNCRC Act. Even where Holyrood has reformed the law, it has often done so simply by amending the existing legislation, rather than by repealing and replacing it or

creating new freestanding provisions. Such amending provisions are also outwith the scope of the UNCRC Act.

Secondly, the UNCRC Act is much more **complicated** than the original Bill, both for public authorities seeking to comply with the UNCRC, and children seeking to enforce their rights. In the original Bill, the application of the compatibility duty depended upon the subject matter of particular public functions – was it devolved or reserved? Now, it depends on the legal source of those functions. Moreover, the line between sources which are included within Act and those which are not is anything but straightforward. There is therefore concern that resources – and potentially litigation – will be diverted to determining, not what public authorities must do to comply with the UNCRC, but instead whether they are obliged to comply.

Thirdly, the line between what legislation and public functions are included in, and those which are excluded from, the scope of the UNCRC Bill is essentially **arbitrary**. It depends on the happenstance of when provisions were enacted and how they have been amended. Indeed, the older Acts which are excluded are more likely to raise issues of incompatibility with the UNCRC, and to deal with issues at the core of the UNCRC rights.

## *Implications for the Scottish Human Rights Bill*

The approach to the interpretive and compatibility duties in the Scottish Human Rights Bill is likely to be broadly similar as in the UNCRC Act, but with two main differences:

1. There will be a “sunrise” period before the compatibility duties come fully into effect. During this initial period, public authorities will have duties to take account of the incorporated rights in their decision-making, as well as planning and reporting duties in relation to the actions they intend to take or have taken to give effect to the rights.
2. At the end of the sunrise period, public authorities will be under a duty to comply with ICESCR and the right to a healthy environment but will remain under a weaker duty to take into account to the three group rights treaties (because of the specific competence issues applying to those treaties).

As far as the scope of the duty to comply and the interpretive duty is concerned, these will in all likelihood mirror the UNCRC Act, with the same implications in terms of narrowing the range of legislation and functions which are subject to the incorporated rights, increased complexity in determining which public functions are included or excluded, and arbitrariness from the point of view ensuring compliance with the incorporated rights. As with the UNCRC

Act, important public functions will therefore fall outwith the duty to comply with ICESCR and the right to a healthy environment.

### **Examples**

- *Social security.* The right to social security is conferred by Art 9 of ICESCR. Social security is mostly reserved, but the Scottish Parliament was given power over certain benefits by the Scotland Act 2016. Devolved benefits are governed by the Social Security (Scotland) Act 2018, and regulations made under it, which will be within the scope of the Human Rights Bill.
- *Housing.* The right to adequate housing is included in the right to an adequate standard of living (Art 11 ICESCR). Housing in general is a wholly devolved function, but it is governed by a mix of pre- and post-devolution legislation. For example, the Housing (Scotland) Act 2001 made extensive reforms to local authorities’ duties in respect of homeless people. Some of these reforms took effect as freestanding obligations in the 2001 Act (and are therefore within scope of the Human Rights Bill), such as local authorities’ duties to adopt a homelessness strategy and to provide advice and information to people who are homeless or at risk of becoming homeless. However, reforms to local authorities’ core duties to rehouse homeless persons were made as



- amendments to the Housing (Scotland) Act 1987, and therefore will be outwith the scope of the Human Rights Bill. Other aspects of housing law, such as tenancy rights for people living in social housing, are wholly contained in the 2001 Act, and therefore within scope. But for private tenants, their ability to invoke ICESCR will depend on when they entered into their tenancy, and hence whether it is governed by the Housing (Scotland) Act 1988 or the Private Housing (Tenancies) (Scotland) Act 2016. The 2016 Act will have to be interpreted compatibly with Art 11 ICESCR, but the 1988 Act will not.
- *Healthcare.* The NHS in Scotland is still governed by the National Health (Scotland) Act 1978, which contains the core duties on the Scottish Ministers to provide a comprehensive and integrated health service, and to promote improvement in people’s physical and mental health necessary to fulfil the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health” (Art 12 ICESCR). Although the improvement duty was inserted into the 1978 Act by the National Health Service Reform (Scotland) Act 2004, both duties will fall outwith the scope of the Human Rights Bill. However, some aspects of healthcare law are contained in freestanding Holyrood legislation, such as the Patients’ Rights (Scotland) Act 2011, which will be within scope.
  - *Human trafficking and modern slavery.* The Scottish Ministers have obligations to provide support to people who are suspected to be victims of human trafficking or modern slavery under the Human Trafficking and Exploitation (Scotland) Act 2015. These duties engage a range of ICESCR duties, including the right to an adequate standard of living (Art 11) and healthcare rights (Art 12). However, they have been partially disapplied by the (UK) Illegal Migration Act 2023. The duties in the 2015 Act will therefore not be within the scope of the Human Rights Bill to the extent that the 2023 Act applies.
  - *Student fees and support.* The right to education includes a commitment to the progressive realisation of free higher education (Art 13(2)(c) ICESCR). University tuition is free for Scottish-domiciled students, but only for those studying full-time at universities in Scotland. In addition, most students are only eligible for repayable loans, rather than grants or bursaries, to cover their living expenses. Rules on tuition fees and student support are contained in regulations made by the Scottish Government: the Education (Fees) (Scotland) Regulations 2022 and the Student Support (Scotland) Regulations 2022. However, these regulations were made under the Education (Scotland) Act 1980 and will therefore fall outwith the scope of the Human Rights Bill.

- *Access to libraries and leisure facilities.* Access to libraries and leisure facilities form part of the right to cultural participation (Art 15 ICESCR). Local authorities have a duty to secure the provision of “adequate” library facilities in s.163 of the Local Government (Scotland) Act 1973, to “ensure adequate provision ... of facilities for recreational, sporting, cultural and social activities” in s. 14 of the Local Government and Planning (Scotland) Act 1982. “Adequate” is not defined in either case, making libraries and leisure facilities vulnerable to closure when local authority budgets are tight. Neither duty will, however, fall within the scope of the Human Rights Bill.
- *Planning law.* Planning is likely to be an area in which the right to a healthy environment is particularly relevant. Planning law in Scotland was consolidated, pre-devolution, by the Town and Country Planning (Scotland) Act 1997. Although the 1997 Act has been heavily amended post-devolution, by the Planning etc (Scotland) Act 2006 and the Planning (Scotland) Act 2019, planning law will mostly fall outwith the scope of the Human Rights Bill.
- *Environmental law.* Most environmental law in Scotland still derives from EU law and was implemented, both before and after devolution, mainly using regulation-making powers under s.2(2) of the European Communities Act 1972. That means that key pieces of environmental

legislation, such as regulations implementing the EU Habitats Directive (Conservation (Natural Habitats etc) Regulations 1994) and the Industrial Emissions Directive (Pollution Prevention and Control (Scotland) Regulations 2012), will not be within the scope of the Human Rights Bill. This will not only limit the application of the right a healthy environment, but in relation to air quality, also the ICESCR right to health. Some EU environmental law was, however, implemented by the Scottish Parliament using primary legislation, such as Part 1 of the Water Environment and Water Services (Scotland) Act 2003 (implementing the EU Water Policy Directive), and will therefore be within the scope of the Bill.

### **Methods for Extending the Scope of the Human Rights Bill**

It is clear that the reach of the rights incorporated by the Human Rights Bill will be severely restricted if the Bill cannot apply to UK legislation in devolved areas, or to public authority functions arising under such legislation. What, then, can be done to bring these provisions within the scope of the Bill?

It must be reemphasised that there is a high degree of legal uncertainty as to what can be done within the legislative competence of the Scottish Parliament, and that potential challenges to competence can come either from the UK Government before enactment of the Human Rights Bill,

or from anyone subject to the Bill (such as public authorities) after enactment. In addition, there is no solution which is as simple and comprehensive as the approach initially adopted in the UNCRC Bill. Some options might be technically within devolved competence, but undesirable or unrealistic for other reasons. Different approaches may also have to be taken to existing legislation in devolved areas, and to future legislation, bearing in mind that future legislation may be enacted by the UK Parliament as well as the Scottish Parliament.

This section therefore examines, first, options for extending the legislative competence of the Scottish Parliament to enable the original, maximalist approach of the UNCRC Bill to be adopted for the Human Rights Bill. Secondly, assuming that these options are not available, it considers whether there are alternative approaches to drafting the Human Rights Bill, within Holyrood's existing legislative competence, that would bring a wider range of legislation and public functions within its scope. Finally, assuming that the Bill mirrors the UNCRC Act, other options to bring existing and future legislation within scope are discussed.

### *Extending Holyrood's Legislative Competence*

1. **Amend the Scotland Act to reverse the effect of the *Continuity Bill and UNCRC (Incorporation) Act References*.** The best option for enabling a maximalist

approach to be adopted for the Human Rights Bill (and to extend the Scottish Parliament's legislative freedom more generally) would be to legislate to reverse the interpretation that the Supreme Court has given to s.28(7). There are several ways in which this could be achieved. The simplest option would simply be to repeal s.28(7), since it is not technically necessary to maintain the sovereignty of the UK Parliament. However, there is likely to be political resistance to this approach for symbolic reasons. Alternatively, a new subsection could be inserted into s.28 to clarify the extent of Holyrood's legislative competence, for example:

“Subject to the limits set out in s.29, the Scottish Parliament has the fullest possible power to make laws, including the power to amend, repeal or in any other way condition the meaning or effect of Acts of the United Kingdom Parliament.”

A third possibility would be to amend Sch.4 para.4 of the Scotland Act to make clear that the prohibition on modification of s.28(7) does not prevent the Scottish Parliament from legislating to condition the meaning or effect of UK Acts. This last option would have the benefit that it could be implemented via an Order in Council under s.30 of the Scotland Act, whereas the other options would require primary legislation. **RECOMMENDED.**

2. **Use powers in the Scotland Act to extend the Human Rights Bill to UK legislation.** S.104 of the Scotland Act confers powers on UK Ministers to make provisions consequential on ASPs, so as to make them fully effective. This is frequently used to give effect to devolved legislation in reserved areas. For example, s.104 was used to give effect to the legalisation of same sex marriage in Scotland in the reserved law of Scotland, whenever passed or made. In principle, it would seem that s.104 could be used – if UK ministers agreed to do so – to extend the interpretive and compliance duties in the Human Rights Bill to UK legislation in devolved areas. The major disadvantage of this approach, however, would be that the application of the Bill to UK legislation would not be apparent on its face; it would be necessary to consult to s.104 Order as well in order to fully understand the scope of the duties it imposes. This might be thought to be objectionable when the s.104 Order is being used to deliver a central feature of the Bill, rather than minor consequential effects. **NOT RECOMMENDED.**

### *Could the Human Rights Bill be Drafted Differently?*

3. **Deem amended provisions in UK legislation to be within scope.** It would, in principle, be possible to deem provisions inserted into UK legislation by devolved legislation to be part of the amending ASP, rather than the amended

UK Act, and therefore within scope of the Human Rights Bill. For instance, in the UNCRC Act, public functions conferred by SSIs, where the power to make regulations has been inserted into a UK Act by an ASP, are subject to the compatibility duty. However, the Scottish Government rejected any wholesale inclusion of amended provisions primarily for reasons of complexity. To do so would require public authorities to identify, first, whether provisions in a UK Act had been amended, and if so whether those amendments were made by the UK Parliament or the Scottish Parliament, and would then mean that certain provisions, or even particular words within a provision, would have to be treated differently to the rest of the Act in which they appear. This could also raise problems of compliance with s.28(7) if it were to undermine the delivery of the policy intention or other aspects of the UK Act.<sup>10</sup> For these reasons, this option is **NOT RECOMMENDED.**

4. **Direct amendment/repeal of UK legislation.** As already noted, the Scottish Parliament is not permitted to condition the exercise of UK legislation in devolved areas, but it is permitted to amend or repeal it. It may be possible to bring existing UK legislation within scope of the Human Rights Bill by adopting a formula that amends it rather than conditions it. For example, the Human Rights Bill could provide that:

*“Any instrument which it is within the power of this Parliament to enact is to be read and given effect subject to the terms of the Scottish Human Rights Act. Any provision, or power to make regulations, which is incompatible with the rights incorporated by this Act is hereby repealed.”*

There are two potential problems with this approach. First, it is not clear whether the Supreme Court would regard a general amending formula of this nature (rather than express amendment/repeal of specified Acts) as being compatible with s.28(7). Second, whereas the UNCRC Act (s.25) provides that legislation that is incompatible with the UNCRC may be struck down by the courts, and that such an order has prospective effect only (i.e., it does not invalidate any decisions previously undertaken in reliance upon it), a repeal would take effect from the date the UNCRC Bill came into force. This option **NEEDS FURTHER CONSIDERATION** to determine whether it is likely to be effective, and whether its advantages outweigh its disadvantages.

5. **Include discretionary powers in UK legislation within scope of the duty to comply.** When revising the UNCRC Bill, the Scottish Government considered that it would have been permissible to apply the compatibility duty to devolved functions arising under UK Acts (or amended UK Acts) where public

authorities had discretion to decide how to act. The UNCRC (Incorporation) Bill Reference clearly required the compatibility duty to be excluded if a public authority were compelled by UK legislation to breach the UNCRC, but the Supreme Court did not address the position in relation to discretionary powers. However, it appears that the UK Government would not give a reassurance that they would not make a further Supreme Court reference if the UNCRC Bill had been amended in this way.<sup>11</sup> The Scottish Government could call the UK Government’s bluff (or hope that that a future UK Government might take a less restrictive view of the effects of s.28(7)) by drafting the Human Rights Bill to include such discretionary powers. This would have the advantage of including the vast majority of public functions in devolved areas within the scope of the duty to comply with the incorporated rights, subject only to a defence if the public authority could show that it had no option but to breach them (mirroring the approach in s.6(2) of the Human Rights Act 1998). However, it is certainly possible that extending the duty to comply to discretionary powers could be regarded as “conditioning” the exercise of UK legislation by changing its meaning and effect. This option is therefore **RECOMMENDED BUT RISKY**.

6. **Extend procedural duties to all public functions in devolved areas.** The Scottish Government also believes that

procedural duties (i.e., to take the rights into account) could be applied to all public functions whether conferred by UK or devolved legislation. Procedural duties could be applied instead of a duty to comply (as during the sunrise period for ICESCR and the right to a healthy environment, and continuing for the group rights treaties), *or in parallel with* a duty to comply. In the latter case, for ICESCR and the right to a healthy environment, the right to comply would apply to functions arising under ASPs, but the procedural duty to functions arising under UK Acts.

A procedural duty is considerably weaker than a duty to comply. It does not compel public authorities to act compatibly with the incorporated rights; if the duty is breached, the decision is invalidated, and the public authority must retake it, this time taking account of the incorporated rights, but it may potentially reach the same decision the second time around. The Scottish Government appears to believe that a procedural duty would not be regarded as “conditioning” the exercise of UK legislation because it does not compel any particular outcome. There is a similar duty in s.1 of the Rights of Children and Young Persons (Wales) Measure 2011, which has not been challenged, and which the Supreme Court in the *UNCRC (Incorporation) Bill Reference* appeared to distinguish from the duties in the UNCRC Bill as being much more limited in scope.

Whether a procedural duty would survive a challenge to its legislative competence is not, however, absolutely certain. For one thing, the Welsh Measure does not expressly include functions arising under UK legislation. In addition, the Supreme Court’s reasoning could be thought to include such procedural duties. Its decisions in the Continuity Bill Reference and the *UNCRC (Incorporation) Bill Reference* do not seem to require that the effect of UK legislation is necessarily changed in order to have been “conditioned”. For example, the interpretive duty in the UNCRC Bill was struck down even though it did not compel the courts to interpret UK legislation compatibly with the UNCRC; it was enough that it might be interpreted differently to what the UK Parliament had intended. Similarly, the power of the courts to issue incompatibility declarators was regarded as conditioning UK legislation, even though such declarators would not have had any effect on the continuing validity of the legislation. By requiring public authorities to take account of incorporated rights when exercising functions conferred by UK legislation, it is certainly arguable that the functions will be exercised differently to the way in which the UK Parliament had intended them to be used.

Again, therefore, this option is – as an alternative to option 5 – **RECOMMENDED BUT RISKY**. It would bring public authorities’ functions arising under UK legislation into the scope of the

Human Rights Bill to a limited extent, but it is not certain that it would be compatible with s.28(7).

7. **Extend non-judicial enforcement mechanisms to all public functions in devolved areas.** As noted, the Scottish Government intends that rights incorporated by the Scottish Human Rights Bill should be enforceable not only by going to court, but by a range of scrutiny bodies, including the SPSO, and that these bodies should be able to consider the exercise of any relevant function within devolved competence. The SPSO's investigatory powers are not currently limited by reference to the legal source of the functions exercised by the public authorities within its jurisdiction. SPSO recommendations are also not legally binding. Given that non-binding incompatibility declarators were regarded by the Supreme Court as conditioning the exercise of UK legislation, it is possible that SPSO recommendations might be regarded as having the same effect. Nevertheless, given that a ruling by the SPSO does not have the same authoritative status as an incompatibility ruling by a court, it seems likely that non-judicial remedies would be distinguished from judicial remedies and hence not regarded as conditioning the exercise of UK legislation. It is therefore **RECOMMENDED** that this option be adopted, regardless of any other measures taken.

8. **Extend planning and reporting duties to all public functions in devolved areas.** The Scottish Government similarly intends that public authorities' planning and reporting duties should cover all functions in devolved areas. Such duties would clearly be supplementary to public authorities' existing legal duties and are therefore would not be regarded as modifying s.28(7) by conditioning UK legislation. These duties are likely to be important, especially in the sunrise period, in encouraging public authorities to identify which of their functions fall within or outwith the scope of the Human Rights Bill, and it may be desirable to impose an explicit requirement to carry out such an audit of their functions. This option is **RECOMMENDED** regardless of any other measures taken.

### *Other Mechanisms to Bring Legislation Within Scope*

9. **Consolidation of relevant UK legislation.** Assuming that the Human Rights Bill does mirror the approach taken in the UNCRC Act, the most straightforward way of bringing UK legislation into scope would be for the Scottish Parliament to consolidate and re-enact as ASPs existing UK legislation in areas subject to the incorporated rights. The Scottish Law Commission has the function, at the request of the Scottish Government, of preparing draft consolidation Bills, and the Scottish Parliament's Standing Orders provide a fast-track procedure for the enactment of

such Bills. The Scottish Ministers could therefore be given a specific obligation, as part of their planning and reporting duty, to consider the desirability of codification. Consolidation is, however, a very time-consuming process, and – given the breadth of the rights to be incorporated by the Human Rights Bill – it would be a major undertaking to consolidate all relevant UK statutes. Whether this would be regarded as a good use of parliamentary time, in the absence of any clear evidence of incompatibility, or other compelling reasons for codification, is questionable. Nevertheless, this is **RECOMMENDED** as a legally unproblematic way of extending the scope of the Human Rights Bill.

10. **Power for the Scottish Ministers to “deem” provisions within scope.** A less onerous option would be for the Scottish Ministers to be given a power to “deem”, via regulations, certain particularly important UK Acts or provisions as being within the scope of the Human Rights Bill on a case-by-case basis. It appears that such a deeming provision for future UK legislation was contemplated when revising the UNCRC Bill, but that the UK Government raised objections to its compatibility with s.28(7),<sup>12</sup> presumably on the basis that it would make the effect of such legislation conditional on a decision of the Scottish Ministers. However, if a deeming power were to be drafted as a power to amend, or to repeal and restate, specified provisions (i.e., a variation on option 4, above), this

would appear to be within devolved competence. The Scottish Ministers have powers to amend UK legislation via regulations in a number of other Acts (including the UNCRC Act – see option 13, below), to which no objections have been raised. Such powers also appear to be applicable to future as well as existing UK legislation. Clearly, though, the possibility of successful challenge could not be ruled out. This option is therefore **RECOMMENDED BUT RISKY**.

11. **Consider impact on applicability of incorporated rights when drafting new devolved legislation.** The way in which the Scottish Parliament exercises its legislative powers in future – whether it directly amends existing legislation, enacts new freestanding provisions, or repeals and reenacts previous legislation – will affect whether future Scottish legislation is within the scope of the Human Rights Bill. While avoiding direct amendment of UK legislation will be preferable from the point of view of maximising coverage of the Human Rights Bill, it may not always be practicable or desirable for other reasons. For example, an amendment (such as changing the name of a statutory body) may affect a number of statutes, or enactment of freestanding provisions may fragment the law in a way that is less accessible for users. Nevertheless, the effect on the scope of the Human Rights Bill is something that should be taken into account when drafting new legislation. It is therefore



**RECOMMENDED** that compatibility statements made by ministers when introducing new Bills into the Scottish Parliament (and/or impact assessments accompanying such Bills) should be required not only to address whether the Bill is compatible in substance with the incorporated rights, but also whether the provisions in the Bill will be subject to the duties imposed by the Human Rights Bill.

12. **Consider impact on applicability of incorporated rights when consenting to UK legislation in devolved areas.**

The impact on the scope of the Human Rights Bill should also be a relevant consideration when the Scottish Ministers are considering whether or not to recommend consent to UK legislation in devolved areas. It is therefore **RECOMMENDED** that the Scottish Parliament's Standing Orders (Rule 9B.3) should be amended to require this issue to be specifically addressed by the Scottish Ministers in any Legislative Consent Memorandum. It is, though, possible that the UK Government may not seek legislative consent for a UK Bill amending devolved legislation (e.g. consent was not sought for the Illegal Migration Act), or that the UK Parliament may choose to ignore a decision to withhold consent.

13. **Use remedial power to resolve compatibility issues in UK legislation.**

The UNCRC Act contains a power in s.39 for the Scottish Ministers to make remedial regulations to amend

legislation which is, or may be, incompatible with the UNCRC. They have similar powers under the Convention Rights (Compliance) (Scotland) Act 2001 to correct breaches of Convention Rights. Both powers extend to UK legislation, and no objection has been raised to either of them. Assuming that a similar power will be included in the Human Rights Bill, it could be used to amend existing or future UK legislation which the Scottish Ministers consider to be incompatible with the incorporated rights. This option is **RECOMMENDED**, though it would remain possible for the UK Parliament to legislate to override the remedial regulations.

Aileen McHarg  
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March 2024

## Footnotes

2. Scottish Government, A Human Rights Bill for Scotland: Consultation, 15 June 2023.
3. Scottish Government, A Human Rights Bill for Scotland: Consultation, 15 June 2023.
4. In some circumstances, UK Ministers also have power to block Bills which are within devolved competence from receiving Royal Assent (Scotland Act 1998, s.35). This may be a risk for certain aspects of the Human Rights Bill, particularly the interaction with the Equal Opportunities reservation, but it is unlikely to be relevant to the specific issues discussed in this note.
5. See Scottish Human Rights Commission, Towards a New Method of Incorporation: A Legal Opinion, 2023.
6. Reference by the Attorney General and the Advocate General for Scotland of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill and the European Charter of Local Self-Government (Incorporation) (Scotland) Bill [2021] UKSC 42.
7. A McHarg & C McCorkindale, 'The Supreme Court and Devolution: the Scottish Continuity Bill Reference' (2019) *Juridical Review* 190; G Cowie, 'The Power to Make Laws for Scotland: the Treaty Incorporation Bills References' [2019] *Public Law* 189; M Elliott & N Kilford, 'The Supreme Court's Defence on Unqualified Lawmaking Power: Parliamentary Sovereignty, Devolution and the Scotland Act 1998' (2022) 81 *Cambridge Law Journal* 4; C Himsworth, 'Incorporation Bills in the Scottish Parliament: The Theoretical and Practical Consequences of Uncertainty' [2024] *Public Law* (forthcoming)
8. The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland [2018] UKSC 64.
9. Letter from John Swinney MSP to Alister Jack MP, 14 April 2022, [letterfromdfministertososscotlanduncrcl4april2022.pdf](#) ([parliament.scot](#)).
10. Letter from Shirley-Anne Somerville to Kaukab Stewart MSP, 13 September 2023, Cabinet Secretary for Social Justice ([parliament.scot](#)).
11. Statement by Shirley-Anne Somerville MSP, 27 June 2023, UNCRC (Incorporation) (Scotland) Bill: Cabinet Secretary's statement – [gov.scot](#) ([www.gov.scot](#)).
12. See note 7.

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