



OFFICIAL REPORT
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Equalities and Human Rights Committee

Thursday 19 November 2020

Session 5



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EQUALITIES AND HUMAN RIGHTS COMMITTEE
24th Meeting 2020, Session 5

CONVENER

Ruth Maguire (Cunninghame South) (SNP)

DEPUTY CONVENER

*Alex Cole-Hamilton (Edinburgh Western) (LD)

COMMITTEE MEMBERS

*Mary Fee (West Scotland) (Lab)

*Alison Harris (Central Scotland) (Con)

*Fulton MacGregor (Coatbridge and Chryston) (SNP)

Gillian Martin (Aberdeenshire East) (SNP)

Alexander Stewart (Mid Scotland and Fife) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Bruce Adamson (Children and Young People's Commissioner Scotland)

Rosemary Agnew (Scottish Public Services Ombudsman)

Mike Burns (Glasgow City Health and Social Care Partnership)

Kavita Chetty (Scottish Human Rights Commission)

Linda Fabiani (East Kilbride) (SNP) (Committee Substitute)

Eddie Follan (Convention of Scottish Local Authorities)

Alistair Hogg (Scottish Children's Reporter Administration)

Dragan Nastic (UNICEF)

Assistant Chief Constable Gary Ritchie (Police Scotland)

Elin Saga Kjærholt (UNICEF)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

Virtual Meeting

Scottish Parliament

Equalities and Human Rights Committee

Thursday 19 November 2020

*[The Deputy Convener opened the meeting at
08:31]*

United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill: Stage 1

The Deputy Convener (Alex Cole-Hamilton):

Good morning, and welcome to the 24th meeting in 2020 of the Equalities and Human Rights Committee. We have received apologies from Alexander Stewart, Gillian Martin and Ruth Maguire, so I, as deputy convener, will be chairing the meeting. Linda Fabiani will be joining later as a substitute for Gillian Martin.

Our first item of business is the second evidence session on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, or the UNCRC bill as it is also known. We will hear from two witness panels and I am grateful to all of the witnesses for their virtual attendance. I welcome our first panel: Bruce Adamson, who is the Children and Young People's Commissioner Scotland; Kavita Chetty, who is head of strategy and legal, Scottish Human Rights Commission; Rosemary Agnew, who is the Scottish Public Services Ombudsman; Dragan Nastic, who is UNCRC strategic lead, Scotland and United Kingdom office of UNICEF UK; and, from Oslo, Elin Saga Kjørholt—I have a pronunciation guide here—who is a lawyer at the Norwegian Ombud for Children and is also representing UNICEF in Norway.

It is a big panel, so I ask the witnesses to be succinct. If you do not feel that you need to add any more in response to questions that have been answered, please do not feel obliged to. We will move to questions in just a second. I remind members that if your question is addressed to a specific witness, please identify them by name, otherwise we will work to the order in which I have just named the witnesses. Once a member has finished their questions, I will invite the next questioner and so on until the session is concluded. We have a lot to get through in a limited amount of time and it is very important that everyone is as focused as possible. Please allow broadcasting staff a few seconds to operate your

microphones before beginning to ask a question or provide an answer.

I will begin with the first question. There is strong support for direct incorporation of the United Nations Convention on the Rights of the Child into Scots law. What are your views on the Scottish Government's approach to the bill? What are the potential benefits or disadvantages of this approach?

Bruce Adamson (Children and Young People's Commissioner Scotland): Fully and directly incorporating the UNCRC into domestic law is the most important thing that we can do to ensure that children's rights are respected, protected and upheld. The bill is a bright ray of sunshine in what has been a very gloomy year. I strongly commend the Scottish Parliament for understanding the importance of progressing the bill during the pandemic, which has shown how vulnerable children's rights are.

The bill is really strong. It builds on an understood framework that we already know through the Human Rights Act 1998 and, importantly, it strengthens it. It has not only the legal compatibility obligation, but the scheme and the additional measures of implementation that are very useful in making rights real. I warmly welcome the approach to time limits, the strike-down and read-down powers, and the additional powers for my office to take legal action to ensure that the right to an effective remedy is supported. Importantly, the bill fully and directly incorporates the UNCRC, as far as it is possible within devolved competence. It brings all the civil, cultural, economic, political and social rights that are contained in the convention into domestic law, and that will lead to a real cultural change—we have seen it in other places—and will make rights real, particularly in economic, social and cultural life.

Some improvements can be made to the bill around interpretation, the definition of public authorities, commencement, the role of the Parliament and ensuring effective remedy, but it sends a very strong message to children and young people across Scotland. They have been calling for incorporation for decades, and I know that the committee has been hearing from children across the country in their thousands, as I have, who are celebrating the bill, which will put their rights into law.

The Convention on the Rights of the Child is special, and the progress on the bill are something that we need to celebrate. The world will be watching tomorrow as we all celebrate the 31st anniversary of the Convention on the Rights of the Child and world children's day. The time is now for the bill. It is a good bill. There are some things we

can do to improve it, but it is really something to celebrate.

Kavita Chetty (Scottish Human Rights Commission): Good morning. As Bruce Adamson said, the bill is a highly significant and most welcome step to progress children's rights in Scotland. The Scottish Human Rights Commission warmly welcomes it. The advantage of the bill and the approach that it takes is that it significantly strengthens the rights of children and young people. It does that in law and it drives us to do that in practice. It does that in a twofold way: by ensuring that children's rights are part of decision making at all levels and by making rights enforceable by courts where violations occur. It takes a maximalist approach by directly incorporating the UNCRC and its first and second optional protocols into Scots law, as far as that is possible within devolved competence. The direct approach of, in effect, lifting the convention text and placing it on a legislative footing is really welcome, because it seeks to ensure that there are no unintended gaps in protection. It ensures that we fully secure the standards as set out in international law and gives us scope to evolve the protections over time.

As the committee knows, the UNCRC is the most widely and quickly ratified international human rights treaty, ratified by 196 United Nations member states. As set out in the preamble to the treaty, its fundamental objective—which is also a source of interpretation for the rights in the bill—is to ensure that children grow up with happiness, love and understanding, and to ensure special safeguards and care, including appropriate legal protection.

As the committee is aware, multiple UN committees have called on the United Kingdom to incorporate the treaty standards into our domestic laws. Scotland will be the first part of the UK to do that to the extent possible within devolved competence, following in the footsteps of jurisdictions around the world—Belgium, Norway, Spain, Sweden—and paving the way, importantly, for incorporation of other international treaty standards. Overall, and subject to some of the issues that we are likely to come to in the course of today's evidence session, the commission is highly supportive of this very progressive legislation and the outcomes that it seeks to achieve. There are a small number of areas where the bill could be further strengthened—for example, in the interpretation of rights, the definition of public functions to be carried out compatibly with the rights and how and when access to children's rights is considered in policy and decision making in an upstream way. I am sure we will cover some of those issues in today's session.

I would like to note that the rights of all of us, children included, are highly interrelated and interdependent, so the incorporation of the rights of all people—not only children and young people—will be vital to secure and embed a human rights culture across society. We see the bill as strongly paving the way for that. The commission is a member of the national task force for human rights leadership, which is looking at taking that forward. It will be really helpful to have coherence and alignment between the duties and obligations that the bill provides for and a proposed broader framework that secures other international and core duties in a meaningful way. We are mindful of that in the comments that we are providing today about the bill.

Overall, the approach of the bill—it lifts the convention text directly and it is maximalist, in that it tries to go as far as possible within devolved competence—is really welcome. The bill and the approach that it takes is something of which the Parliament can be proud.

Rosemary Agnew (Scottish Public Services Ombudsman): Thank you very much for the opportunity to speak this morning. I am not going to add to what others have already said about improvements to the bill, but you asked us about its pros and cons.

The pros are self-evident and they speak for themselves. In particular, there is the emphasis on the child as opposed to children as an amorphous group or as a vulnerable group—however you want to say it. It is really important that the focus is on the child.

There are a couple of things that I would regard as threats, rather than cons, that you need to be mindful of, and one is about the transition from childhood to adulthood. We have talked about definitions. A child is a child up to the age of 18, but often those who need the support of public services need it beyond the age of 18. We need to think about having alignment and a cohesive approach.

The other issue is not a threat, but we need to be mindful of supporting public bodies with the incorporation. Over the past year, with the incorporation of new whistleblowing powers for the national health service, we have learned that the issue is not just about process or policy; it is about enabling a culture change at the roots level. My interest is very firmly in complaints and complaint handling, but I recognise that that cannot be taken in isolation and, fundamentally, we need a culture of appreciating the child in everything that we do.

The other thing to emphasise, which a couple of people have mentioned, is the definition of a public authority. I think it is very helpful to think of it as a public function or public service, so that you focus

not on the organisation but on what is being delivered and to whom. I will leave it there on your first question, because I do not want to take up time in which others could add things, and we may come back to some of those issues later.

The Deputy Convener: I will now bring in Dragan Nastic, strategic lead for UNCRC at UNICEF.

I am afraid we do not seem to have audio from Dragan. We will move to Elin Saga Kjørholt while we sort out Dragan Nastic's audio issues.

Elin Saga Kjørholt (UNICEF): Thank you for the opportunity to speak to you today about the experience that we have had in Norway. I support what the others have said. It is very important, in this holistic approach, that all the rights are taken into the law at once, so that we do not have a fragmented approach. The rights in the CRC are combined in a holistic way, so they need to stand together.

Full and direct incorporation has been very successful in the Norway experience. We have changed awareness quite a lot to see children as subjects with rights instead of objects that we should support, which is very useful for how we see children when we approach them with services, for instance. We also have much higher awareness in all levels of society, publicly, through the media. Since incorporation, all the legal actors have quite different approaches to seeing children as rights holders, which is very useful. We have also seen that the authorities became much more committed to the rights than they were before. It has changed the culture of how we view children and children's rights.

08:45

You asked about the challenges. The argument in Norway was that the provisions were too vague and aspirational, but we have seen that they are not very different from other legal instruments—at least not those relating to other human rights. The Norwegian Association of Judges said, "We do this every day. This is what we do. We interpret legislation that is not always so clear." That is one point.

There was also an objective that incorporation should have budgetary consequences for the superior mandates of the Parliament, but we have not seen that in Norway. I can explain more about that later.

The Deputy Convener: Thank you so much, and I extend a particular welcome to you in Norway. We will try Dragan Nastic and see whether he has his audio. Hello, can you hear us?

Dragan Nastic (UNICEF): Good morning. Can you hear me?

The Deputy Convener: Yes, we can.

Dragan Nastic: Thank you for inviting me. It is a privilege to be with you this morning. UNICEF congratulates Scotland on an excellent bill. We work in 196 countries and territories all over the world and we have seen that, in those countries where the CRC has been incorporated into domestic law, it has served as and provided a platform for legal and other non-legal measures of implementation. It was instrumental in bringing rights home to children and duty bearers.

From an international perspective, the Scottish bill is, indeed, unique. First, you are fully and directly incorporating the convention as defined and recommended by the UN Committee on the Rights of the Child. Beyond that, the bill also has a package of active and reactive implementation measures, and in that sense it is really unique from an international perspective. No other country has gone that far in its process of incorporation. We are absolutely sure that the incorporation in Scotland will be a success and will lead to a better and more effective realisation of child rights.

The United Nations Children's Fund is very keen to work together with you in the implementation process. The bill has many qualities and there are many good things to say about it. There are no shortages or faults. There are some areas where the bill can be further strengthened, but it is excellent. We congratulate Scotland. We have promoted and publicised the bill in all countries in the world. We very much hope that Scotland will now show the way here in the UK, because it is the first UK country to incorporate the convention, and that it will serve as a guiding light for other countries where incorporation is on the agenda, such as Denmark and Germany. Bravo, Scotland. Thank you.

The Deputy Convener: Thank you very much—that was certainly worth waiting for.

Dragan Nastic and Elin Saga Kjørholt touched on my second question, but I would like to expand it to the wider panel and go into a bit more detail. Scotland is by no means the first country to incorporate the UNCRC. What can we learn from the approach to incorporation of the countries that have gone before us and can that help to improve the bill? I will go to Bruce Adamson first.

Bruce Adamson: That is an important point. Our bill is fantastic and goes further than other places have gone, but we are by no means the first country to do this. A number of other countries, through their constitutional systems, automatically incorporate as soon as they ratify treaties and so have a different legal tradition. We have learning from them and from other countries that are more similar to Scotland.

There is some really good progress when we look to our Nordic neighbours and to our North Sea neighbour Belgium. This week, I participated in a conference of the European Network of Ombudspersons for Children, which was attended by commissioners and ombuds from all those countries. They spoke about the cultural change that is delivered through the mechanism of incorporation. As Elin Saga Kjörholt talked about, there is a changing view towards children, particularly on things such as participation in decision making and children's rights budgeting. Incorporation changes the way in which we understand children's rights. That is important and it is the thrust of the bill.

The reason why we need the legal protections and the ability to take legal action is to help to drive that culture change, but the bill is really about changing the way in which we see children. The examples that were given from other countries—UNICEF has studied the issue in depth, so I am sure that Dragan Nastic will be able to speak to it—show that there is a real change in how children perceive themselves and in how those in power perceive children. Decision making becomes more efficient and effective, because children's views and their best interests are more properly considered, and that leads to better outcomes.

There are a lot of very positive changes. It speaks to article 4 of the convention, which is about the state's obligation to put in place all legal and administrative processes to ensure that children's rights are realised. It is also about using the available resources to the maximum extent possible. Incorporation starts to change the dynamic in how decisions are made and how services are delivered to particularly focus on children's best interests, and we also see big improvements in children's participation in decision making.

It is all good news. Although we should be very proud, because the bill is very strong, we have a lot of learning to do from colleagues across Europe and other parts of the world who are further along in the journey than we are.

The Deputy Convener: The witnesses need not go into great detail if this area is not your speciality, but we are keen to hear from you. Kavita Chetty, would you like to add anything?

Kavita Chetty: No. I will defer to the children's rights specialists and international colleagues on that important question.

The Deputy Convener: Rosemary Agnew, would you like to contribute on that specific question?

Rosemary Agnew: I will not repeat what Bruce Adamson has said so eloquently. I will just focus

on the sort of things that I would like to learn from those who have gone before us. I am sorry if this sounds mundane, but it is about the practicalities, such as what people did, how they helped to bring about culture change and how they supported children, parents and carers and public services to bring about that culture change and think creatively about how services could be delivered in a simplified way to encompass all the things that they were trying to achieve.

The other thing that I would be interested to learn is how people measured whether the approach was successful. How do they know it worked? It is not enough just to say that we are doing it; we need to be able to demonstrate that we are doing it well.

Dragan Nastic: Incorporation has great value and brings a lot of positive impacts. Our research and observations in countries around the world show that, in the countries where direct incorporation has taken place, awareness of child rights has grown and the acceptance of children as rights holders has been strengthened as a result. That is especially the case in countries where a lot of preparatory work and consultations have been done on the incorporation.

Sweden is a good example of that. The preparatory work, the consultations and passing the bill took several years and involved a lot of stakeholders. We think that the process of incorporation that is being followed in Scotland very much builds on the positive experience of Sweden. There was a wide consultation last year that involved many stakeholders, duty bearers and rights holders. That dialogue continues, and we thank you and your committee for this inquiry and evidence session. That will all contribute to better implementation.

A second point is the implementation of the incorporation legislation. We have conducted specific research on all the countries that have incorporated the convention into their domestic law, either by automatic ratification or by a separate parliamentary act, and the countries where major pieces of law reform have been done. A key finding from that research is that, in most of those countries, unfortunately, the incorporation was followed by stagnation and the momentum was not kept up or followed with a range of legal and non-legal measures of implementation.

It is important to bear in mind that incorporation is not an end in itself and that it must be part of a broader holistic strategy for promoting, protecting and realising child rights. The main obstacles and difficulties that were reported to our research show that there is a need for better planning and co-ordination and more awareness, training and education activities. Only that can lead to better awareness of child rights and a more robust

infrastructure to ensure implementation and more effective realisation of child rights.

UNICEF wants to step up our activity in Scotland and contribute to effective implementation of the bill. In Scotland, 1,337 primary and secondary schools are part of our rights respecting schools programme. That means that 54 per cent of all schools are affiliated to our scheme, through which children not only learn about their rights but live their rights. Children become aware of their rights and of the rights of their peers, and they respect those rights. Other members of the scheme are institutions such as stand-alone nurseries, additional support needs schools and children's homes. We very much want to step up our programme in Scotland and align it closely with your implementation measures, so that we make our contribution and ensure that the stagnation that I talked about does not happen in Scotland and instead that the bill is followed with much stronger and effective realisation of child rights.

The Deputy Convener: Elin Saga Kjörholt, you are speaking to us from Norway, which obviously has gone before us in this regard. Can you answer the question about international examples from your experience?

09:00

Elin Saga Kjörholt: I guess that I will present more concrete examples for you on the question.

I agree with Dragan Nastic and the others that it is an important step to incorporate the whole CRC and take it into domestic law. That is the first important step and, from what I have seen of your bill, it looks excellent. The main point is to take the whole thing. That is important, because the convention is holistic. There is a close connection between some of the articles, and they cannot be separated.

That is the first step, and then some of the benefits come for free, because awareness will increase, especially among lawyers. In Norway, they started to use the CRC as a tool much more, including in the courts. That raised awareness among people in other services, when they saw a court order that said that they had to speak to children before deciding what to do. The awareness starts to move out into other services, but that is not enough.

You must have a strategy for how to benefit from the incorporation. You should increase knowledge. Of course, there is literature such as the Tobin commentary from the Oxford University Press, but that is too difficult for people who are working in services. In Norway, the authorities gave us money to make a book that could be used and understood by people providing services

directly to children in kindergartens, schools, the welfare system and the health service. That is very important.

It is also important to provide training. We should have done much more training in Norway. If we had done so, we would have been better off and further on with the implementation side than we are today. That is my advice. You should also implement a monitoring system. In Norway, we have county governors, and we have an ombudsperson for public authorities. Those institutions look into how our different services apply the CRC. It is important to monitor that and to provide guidance on how to implement the CRC and fulfil children's rights.

I hope that it would come naturally to lawyers, but maybe you should train lawyers, and those involved in complaint mechanisms should have training on how to understand children's rights. You should also use tools such as the general comments, which are useful.

The Deputy Convener: Thank you.

Before I pass over to my fellow MSPs, I advise everyone that we have an hour left for this panel and we have 10 questions to get through, so I am keen to keep answers as succinct as possible. However, we are grateful for your input so far.

Mary Fee (West Scotland) (Lab): Good morning. I have a number of questions to ask, which I will group together. I apologise if my questions seem rather long, but I am keen to get through everything. The first is on section 4 of the bill—"Interpretation of the UNCRC requirements". Do you think that it should be expanded to take account of the general comments and concluding observations, and any other opinions on international human rights treaties? Do you believe that amending the bill in that way would have any unintended consequences?

My second question is about duties on public authorities and the role of the court. Section 6 of the bill places a duty on public authorities not to act incompatibly with the UNCRC requirements, but it has been suggested that it would be better if the bill was strengthened by introducing a "due regard" duty. I would be keen to hear the panel's views.

Bruce Adamson: Those two questions cut right to the heart of how we could improve the bill. I strongly agree with strengthening section 4 on interpretation. I often describe the UNCRC as the most beautiful legal document in the world. As Kavita Chetty mentioned, the preamble starts with the idea that children should grow up in a family environment of happiness, love and understanding, and it goes on to set out all the obligations to support families to make sure that children can thrive. However, it is a 31-year-old

treaty, and it is important that we understand the rights in context. There is a lot that we can do to strengthen that.

As Elin Saga Kjörholt said, judges interpret law every day. That is not a challenge for judges, but it would be useful to add in additional guidance on how to understand the treaty in the modern context. The Vienna Convention on the Law of Treaties sets out that interpretation should be carried out in good faith and in accordance with the context and the objective and purpose of treaties. The UN committee does an amazing job in setting that out through things such as general comments, which are the interpretative guidance on specific elements of rights, or concluding observations that are specific to states, which we can also learn from. In addition, optional protocol 3, which the UK has not yet ratified, provides a communications mechanism so that cases can go to the committee for determination. Those decisions would provide very important jurisprudence when it comes to interpretation. The work of the other treaty bodies that speaks to how we understand and interpret the convention would be useful, too. I think that the bill should be strengthened in that respect.

A good example is the general comment that is currently being produced on children's rights in the digital environment, on which work was done through the European Network of Ombudspersons for Children last year. The convention was drafted before the internet was widely available, and certainly before social media, so the general comment will help us to understand how to interpret the rights to privacy, to protection, to access information and to education. We need that. General comments go out of date over time, so we need to be able to keep up with the living instrument that is the convention. That is very important.

It is also very important that the legal community has access to that information and knows that that is the approach that should be taken. It is important that such instruction is on the face of the bill, because judges in other countries have sometimes commented to me—with a sense of frustration—on the lack of arguments. When such instruction is not expressed on the face of a bill, the legal community can sometimes be slow in making some of the arguments and properly understanding what is required. The purpose of that is to support not just the judiciary but the legal community and children themselves in understanding that the convention needs to be interpreted through the aid of additional things such as general comments, reference to which we could add to the bill. I strongly support that.

On public authorities, was it the private-public element that you asked about or “due regard”?

Mary Fee: My question was about “due regard”; I will come on to the issue of public authorities in a moment. As it is currently drafted, the bill contains an obligation to act in a way that is not incompatible with the UNCRC, but it could be strengthened by the inclusion of a “due regard” duty.

Bruce Adamson: We have the experience in Wales, where they have led with the “due regard” duty. The important thing for me is that we have a strong duty to act compatibly with the convention, which I think drives legal change. The inclusion in the bill of a duty not to act in a way that is incompatible with the convention will drive change. A “due regard” duty might be a useful additional requirement, but it should not be seen as being in any way a substitute for the very important legal duty to not act incompatibly with the convention. I think that that, in and of itself, is enough to drive change, because it is necessary to put in place mechanisms such as impact assessments to ensure that that is delivered on.

Kavita Chetty: The commission strongly believes that section 4 needs to be built on and strengthened to ensure that we keep pace with the highest standards of protection internationally. One of the most compelling advantages of the direct incorporation model that is taken by the bill is that the formulation of the rights is identical to that of the international treaty, which means that it is identical to that of those rights that have been directly incorporated in other jurisdictions around the world and that, therefore, there is a rich source of international and comparative sources of guidance on the rights. That puts flesh on the bones and gives meaning and content to the rights for public bodies and the courts.

As it stands, I do not think that the bill capitalises on that advantage by directing courts to those sources of interpretive guidance. We are strongly of the view that, to fulfil the ambition of the CRC being the gold standard in children's rights and it keeping pace with those developments in international law and being a living instrument, there needs to be a direct link to international guidance on the interpretation of the rights.

The domestic courts are quite well accustomed to drawing on international sources to aid interpretation. They have done it for a long time with the Human Rights Act 1998, which involves taking account of European Court of Human Rights case law, and they would do it again with regard to guidance from elsewhere. We recognise that the general comments are not binding sources of law and are not drafted as such, but they provide an invaluable and authoritative interpretive analysis to give substance to the rights that are contained in the bill. Courts are equipped to take those non-binding sources into account

and to give them appropriate weight in their reasoning.

In recent years, we have seen how courts have had regard to unincorporated treaty provisions and general comments as important sources of law and guidance. For example, we saw that in the Supreme Court case that challenged the benefit cap. The court cited the UNCRC and the best interests of the child, and it explicitly referred to general comment 14 of the committee as authoritative guidance. In saying that, it is not a routine approach for courts at the moment, and I think that appropriate signposting for courts on the face of the bill would be very welcome.

The First Minister's advisory group on human rights leadership, which advised on a broader framework and looked at other international treaties, particularly the International Covenant on Economic, Social and Cultural Rights, recommended that there should be an obligation on courts to have regard to international law. That included the UN treaties, the treaty body decisions, general comments and recommendations, and comparative law. It is important to note the distinction between having to have regard to such sources and their consideration being binding. A duty to have regard to those sources merely ensures that courts will take them into account. However, it will also ensure that there is a strong connection between the rights in Scotland and those under the international framework.

As far as unintended consequences are concerned, I think that the biggest risk here is the unintended consequence of not taking account of such sources and ending up with rights in the framework that are not aligned with the rights internationally in other jurisdictions around the world.

On your second question, we have two issues with the duties—one with the formulation and one with the framing. It is very welcome that we have the duty to not act incompatibly—that is great—but a key policy driver of the bill is to secure rights-based decision making in an upstream way, so that children's rights are embedded in policy and law making up front. One of the ways in which the bill seeks to do that is through the children's rights scheme—the reporting duties on public bodies—but, particularly with impact assessment, that will often be directed only at situations in which a policy decision is being taken or something is being considered. I am not convinced that it pushes the proactive consideration of opportunities, whereby children's rights can be advanced. That is particularly important when we are thinking about rights of a socioeconomic nature, such as the rights to housing, food, health and so on. Because those rights require positive

steps to be taken to ensure that they are fulfilled, they require to be progressively realised, which involves improvements being made over time.

We think that the bill could go further to ensure that those underlying obligations—those proactive positive measures—are better understood by public bodies so that they can build human rights and children's rights into their decision making, their priority setting and their budgets. There are different ways to achieve that and drive through that change. It could be done by including in the bill an overarching obligation to respect, protect and fulfil the rights. Another way to do that would be to profile the progressive realisation duty more strongly, but a way that would be more familiar to public bodies would be to reframe and differently articulate that duty and to include the "due regard" duty. At present, the bill takes the model that is set out in section 6 of the Human Rights Act 1998, whereby it is unlawful for a public authority to act in a way that is incompatible with the rights in the European convention on human rights and the Scotland Act 1998.

09:15

The proposal of the First Minister's advisory group on human rights leadership and the children's commissioner involved a dual duty that comprised a compatibility duty and a "due regard" duty. I think that that approach would provide clarity on the obligation of conduct or process and would ensure that there was rights-based decision making as part of the "due regard" duty, as well as those of—

The Deputy Convener: I am sorry to stop you. It is fascinating stuff, but I am conscious of time and how much we have to get through.

Rosemary Agnew, is there anything that you would like to add?

Rosemary Agnew: In relation to section 4, it is not just the judiciary and public bodies that would benefit from the proposed extension. Children are often involved in a range of other processes in which decisions are made about them or on their behalf, such as children's hearings. The more advice, explanation and interpretation there is, the better; that can only be a good thing.

On the duty not to act incompatibly with the UNCRC requirements, I observe that showing that your action is not incompatible with something is quite difficult. It is probably more helpful for public bodies to have clarity and positivity about demonstrating what they are doing.

The Deputy Convener: Thank you for your brevity. I will bring in Dragan Nastic.

Dragan Nastic: I also think that the section on sources of interpretation should be extended to

include not only the products of the UN Committee on the Rights of the Child, but general comments by other UN human rights monitoring bodies. I refer the committee to the submission by Professor Aoife Nolan, which explains the importance of those products for better interpretation of the convention. The policy memorandum recognises the value of such sources of interpretation, but it says that, because they are not legally binding, it was decided that they should not be given special status. I think that a way out would be for such sources to be mentioned on the face of the bill without necessarily giving them any special legal status.

I want to point to two examples from abroad—a positive one and a negative one. The positive one is from Sweden. The Swedish Government's Ministry of Justice produced a guide on interpretation of international treaties—especially the Convention on the Rights of the Child—specifically for the judiciary. It is not a statutory guide; it is more of a handbook or manual—it is almost 200 pages long—that will help the Swedish judiciary not only in their training, but in using the convention when they decide on specific individual cases. The policy memorandum to the bill mentions that the Scottish Government intends to produce a number of non-statutory pieces of guidance, so that tool or the children's rights scheme could be used to extend the sources of interpretation. It is very important to do so.

A negative example is from Iceland, where the incorporation bill did not contain any proactive measures. Indeed, following the incorporation, implementation was a bit slow. Government officials tell me that, even these days, the level of knowledge and awareness of the convention and child rights among the judiciary is still low. That is one of the reasons why the convention has not been widely used by the judiciary. It is important that section 4 is extended.

I have a quick line about a “due regard” duty. A “due regard” duty is a positive measure, but the Welsh Government took that option because it could not incorporate the convention. It would have done that, but incorporation of international treaties is still outside the powers of the Welsh Government and the Welsh Parliament, so the “due regard” duty was their maximalist approach. As Bruce Adamson said, the Scottish bill has a number of proactive and reactive measures that I am sure will ensure compatibility and proactive implementation of the convention.

The Deputy Convener: Thank you very much. Finally, we come to Elin Saga Kjørholt, after which I will bring Mary Fee back in.

Elin Saga Kjørholt: On the Norwegian experience of general comments, they are a very important tool in interpreting and understanding

the rights, and in applying them. As has already been said, the document is starting to get quite old and it will not be renewed, so such interpretations by the committee are important.

In Norway, the general comments will be preparatory work, which means that they do not have any legal status but they will be taken into account and will apply when courts interpret the rights. The Supreme Court of Norway has considered the weight of the general comments several times. This spring, it concluded that it considered them to have great weight when it interprets rights in court cases.

The general comments are also important tools for people who work with children, especially those on the right of the child to be heard and the best interests of the child. They are very important tools that show how to take children's rights and interests into account in practice.

The Deputy Convener: Thank you, and thanks for your brevity as well. Mary Fee has more questions.

Mary Fee: I have two further questions. The first concerns public authorities, and it is something that all of our panel members have touched on in previous answers. Are you content with the definition of public authority? If not, what do you think needs to be done to strengthen that definition, and how should it be changed?

Bruce Adamson: This is a very important point. We need to strengthen that. The intention is to make sure that children's rights are always protected, and we need to insure against the privatisation and opting-out of those protections. General comment 16 from the CRC is very clear about the fact that states are not exempted from their obligations by outsourcing or privatising, so it is important that that protection is in there.

I understand the approach the Scottish Government is taking here, following the very familiar Human Rights Act 1998 model, but we are aware of issues relating to that, which we know from the jurisprudence on that—you received some very strong evidence last week on this point, and I would also point to the written evidence from the SHRC and JustRight Scotland, which cover that point well.

I associate myself with the view that we need to strengthen the bill in that regard. A lot of this work has already been done. The dissent from Lady Hale in the *YL v Birmingham City Council* case is instructive, as is the work of the Joint Committee on Human Rights at Westminster. I associate myself with the comments of Dr Katie Boyle and Andy Sirel from last week, because I think there is an easy way forward here. However, the key point is that the way in which the Human Rights Act 1998 provision, which is the same as this, has

been interpreted has narrowed the definition, which means that children would miss out if we do not change this definition.

The Deputy Convener: Kavita Chetty, you may come in now—apologies again for cutting you off mid-flow earlier.

Kavita Chetty: No problem. I probably have more to say on this question than on other areas that you will want to cover. As the children's commissioner has just said, the approach taken in the bill here is the same as that taken in the Human Rights Act 1998, where a public authority is defined as including any person whose function is of a public nature. However, we know that that definition has been beset with difficulties when interpreted by the courts. We think that it needs further consideration and that alternatives need to be explored.

As Bruce Adamson has said, it is a well-established principle of international law, including explicitly in the UNCRC general comment 16, that the state cannot divest itself of its human rights responsibilities by outsourcing or delegating them. If Scotland is to fulfil its international obligations in the way that the bill intends, it must ensure that those accountability gaps do not persist through the contracting-out of services that are not caught by the definition in the bill and it must ensure that services that are outsourced to private or voluntary sectors are brought within scope. The children's sector has flagged that that might happen in relation to private housing providers, childcare, private foster care, private schools and various other areas. The court's interpretation of section 6 of the Human Rights Act 1998, which is mirrored in this bill, has created a lot of uncertainty about the situations where that act applies. That uncertainty over the application and the scope of the legislation creates unintended and unequal outcomes for individuals, and it undermines the idea that human rights need to be central to public service delivery. Those involved in the delivery of public services, whether they are a core public authority or a private party, need to be clear about their obligations to accept that idea and implement it. The situation needs to be improved.

We think that further clarity can be provided through a strengthened definition, through guidance or through regulation. That would mitigate against those unintended accountability gaps. I will not go through all of the case law history of this now, but the approach that the courts have taken appears to be in direct conflict with what was said during the passage of the Human Rights Act 1998 through Westminster. The Joint Committee on Human Rights at Westminster has been very concerned about that. It has conducted two inquiries into the issue, one in 2003-04 and one in 2006-07. The report suggests

several options to deal with the situation, and we think that probably a mix of those options could strengthen the approach taken in the bill.

The first approach involves strengthening the definition. It suggests alternative wording with explicit connection between the functions that are being performed by the body that are pursuant to a contract or some other arrangement, and it also says that it is possible to look at introducing guidance or even regulations that provide further clarity. For example, that guidance or those regulations could set out a connection between the service that is being provided, based on the functions that are involved, and the rights that are to be protected in the bill. That would be in line with international law. There are criteria set out by Lady Hale, as referred to earlier, in the dissenting judgment in the key case in this area, *YL v Birmingham City Council*, which provide guidance on what could constitute a public function. We think that that could be worked with and put into regulation or guidance to provide more clarity on this issue and avoid unintended gaps in accountability.

Rosemary Agnew: I will be brief. I agree that more work needs to be done on the definition. It is important to focus on the function, but equally there has to be a focus on the obligation—I think that that was the phrase that Bruce Adamson used—and the obligation needs to follow the child wherever they are receiving a service. In designing these services and when setting out the definition in the bill, I would ask whether the child's rights and the protection of them are as strong now as they would be if a public service had been delivering the service directly.

09:30

Dragan Nastic: I very much agree with everything that Bruce Adamson and Kavita Chetty have said. Here, the duties go much wider than just ensuring that children have redress and are able to take legal action against public authorities or anyone else providing a public function for children.

Article 3(3) of the CRC establishes the obligation of the state party to set standards in conformity with the convention and to ensure compliance by appropriate monitoring of all institutions, services, facilities and providers. There is a duty not just to enable access to justice but to set standards, to set up permanent monitoring mechanisms and to do regular inspections of all these public authorities and private providers.

I will refer you to the general discussion day of 2002 by the UN Committee on the Rights of the Child specifically on this topic and a guide and

recommendations put forward by the UN committee on this very subject. That is another example of how important these general comments and other documents of the UN committee are for effective implementation of the convention. I think that, as Kavita Chetty said, these duties and obligations should find their place either in the bill or maybe through some non-statutory guidance or a children's rights scheme.

Elin Saga Kjørholt: We do not have this discussion in Norway. As long as the private services deliver services on behalf of the officials in Norway, the officials in Norway are bound to ensure that they have followed the CRC. Also, as a human rights lawyer, I agree with Kavita Chetty's arguments.

Mary Fee: My final question is on the court and tribunal system, because it is what will be delivering the judicial remedies in the bill. Do you think that the existing court and tribunal system is accessible to children? If not, are there any changes that we can make through this legislation to make it more accessible? How can we ensure that the remedies that are applied will be effective?

Bruce Adamson: This is a very important point. On the example that was given earlier about judicial instructions, we have a bench book in Scotland. A lot of work is done by the Judicial Institute for Scotland and others to make sure that the judiciary at all levels is properly up to speed on things, which is very useful. There have already been discussions and work done by the Judicial Institute for Scotland on this issue. Judges, as others have said, are already very used to the interpretation of international law, so that is very useful.

I would also point to the work that has been done by May Dunsmuir, the president of the health and education chamber of the First-tier Tribunal for Scotland, particularly around additional support needs and the new suite that was opened, which was designed by children for children. There is a lot of interesting work going on to make sure that we can have child-friendly justice and access to an effective remedy. There is a lot that we can learn from, but the starting point is a bit of a low one, I have to say.

Our mechanisms for justice are designed by adults for adults. They are even quite intimidating for adults, to be honest, and so making sure that children who are in a position of having their rights breached are able to access the system will require significant change. We have seen some very good practice though in Scotland, which is useful, as is, again, some of the work that the children's hearings system is doing. There are some real positives, but we have a long way to go. The important thing is getting children and young

people to be part of that design change, but we have a long way to go to deliver child-friendly justice.

A number of the written submissions talk about what an effective remedy looks like and all the different elements of that. I will stop there, in the interests of time, but I will just say that an effective remedy involves lots of different things. What I would look to see from the bill is quite a radical change in the way in which the courts and tribunals work to make them more accessible to children and young people.

Kavita Chetty: This is another meaty question. As Bruce Adamson said, we know that children—not only children but people of all ages across Scotland—face significant barriers to accessing justice in its fullest sense. In international law terms, remedies for violations are expected to be accessible, affordable, timely and effective, and they encompass not just judicial remedies through the courts but also administrative remedies. No doubt you have heard from many young people about how our current system does not provide for that and that routes to justice can be convoluted, hard to find, lacking in support, slow and expensive.

The UN Committee on the Rights of the Child has pointed out in general comment 5 that, for children to access justice, they need child-friendly information, advice, advocacy, support for advocacy, access to complaints procedures and access to assistance. I saw in evidence to the committee last week the extent to which people were alluding to the current system having evolved considerably over recent years, in relation to, for example, children's participation in legal processes, but it still falls short of being child friendly. Colleagues from the children's sector will be able to speak to those issues better than I can.

I think that the bill still provides an opportunity to help us to continually evolve, improve and build on our redress system to meet the needs of children. One of the ways that we think that could be done is by ensuring that the children's rights scheme under the bill asks for more detail to be set out on access to justice support for children and young people and for what is being done to advance that—for example, information on how child-friendly complaints are being advanced, legal aid, how the resourcing of children's access to the assistance is being improved and how services for vulnerable children, like care-experienced children or migrant children, are being supported. It can also be addressed through guidance to public bodies on making accessible information available to children and young people and including that as part of the reporting duties. We think that there is an opportunity there.

I will not go into the second part of your question in a lot of detail now, because it is a huge question. The right to an effective remedy—not just accessible but effective—is the cornerstone of human rights. I will not go into the remedies that are currently in the bill. It is worth saying that we think that, because of the nature of the types of challenges that will be dealt with—the systemic issues, the issues of a socioeconomic nature where there are multiple victims and the issue of there being multiple responsible parties—we potentially need to develop a broader range of remedies by the courts over time. Dr Katie Boyle talked about that somewhat when she gave evidence last week.

One of the things that we would consider in that regard would be the development of structural remedies through, for example, structural interdict to address those systemic issues. Essentially, that is where a court gives a specific direction to a public body to ensure compliance, so that the violation is not perpetuated for others. The court might even take a supervisory role in overseeing the implementation of a judgment. I do not think that I have time to go into that in any more detail here now. The national task force on human rights leadership will be looking in more detail at how we can evolve those types of remedies over time.

The Deputy Convener: Thank you. I should say that, if any of you would like to expand on any of your answers today, you are more than welcome to write to the committee.

Rosemary Agnew: I am not going to repeat what has already been said, but I will make a couple of observations. This issue is about remedy. If one of the things at the heart of what we are doing is ensuring that children are listened to—in their words, not our adult interpretation—we have to be much more open to remedies being resolution based, to involving children and to listening to what they think the remedy should be. I strongly support Kavita Chetty's point about structural changes because, as with any complaints system, we need to learn from it for the benefit of all. I will stop there in the interests of brevity.

Dragan Nastic: Kavita Chetty has beaten me to it. I was going to suggest the very same thing: that access to justice be included on the list of the things to be addressed in the children's rights scheme, because, children's dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. States need to give particular attention to ensuring that there are effective child-sensitive procedures available to children and their representatives.

I would cite the good example of Wales, where the children's rights scheme produced in 2012 gives a lot of attention and space to the issue of

access to justice. There are two separate chapters in that scheme dealing with this issue. There is a chapter called "What can children and young people (or their representatives) do if they think Ministers have not had due regard to the UNCRC?" That chapter lists a number of available avenues, legal and non-legal, to take an action. Then there is another chapter called "Support for children and young people who want to complain about or Challenge the Welsh Ministers". That chapter deals with specific mechanisms in Wales for child-friendly information, advice, advocacy, support for self-advocacy and access to independent complaints procedures. The children's rights scheme in Wales has a wealth of information in this regard. It is a helpful guide, but it also serves as the basis on which Wales continues to develop and expand child-friendly mechanisms. I think that it is worth considering following it in Scotland.

Elin Saga Kjørholt: I have few good examples to contribute, so I will give the floor to someone else.

Mary Fee: Thank you. I am grateful to the witnesses for their answers.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I have a few topics to go through. Not all panel members need to answer every question. If you feel that issues have already been covered, please say so, as it will help us to get through everything.

First, following on from my colleague Mary Fee's line of questioning, I want to ask about who can bring court proceedings. Section 10 of the bill specifically empowers the children's commissioner to raise court proceedings in respect of the duty on public authorities and, more generally, section 7 of the bill says that an individual or organisation may raise court proceedings in respect of the duty if they can demonstrate sufficient interest.

Are you happy with the overall approach, including the Government's policy intention in the wording of sections 7 and 10? I suppose that it is best for us to hear first from Bruce Adamson. I assume that he welcomes this aspect of the bill.

Bruce Adamson: Your assumption is absolutely correct. On section 7, last week's witnesses covered really well how sufficient interest works and the growing understanding of the opportunities there, so I will focus in my comments on the powers of my office, section 10, and section 22, on strike-down and incompatibility declarators, which allow for intervention in those cases.

This is a really important power. Since I took office in 2017, I have restructured and built expertise on the matter in the office, within existing rules. We have made a number of interventions at

the Court of Session and indeed recently at the Supreme Court, just relying on the rules of court. However, to have the power set out specifically in the bill is really useful. It is really important in relation to what we can do to ensure that the court is assisted in taking cases.

09:45

The additional power to take cases in my name, as commissioner, is a really important addition as it will allow us to take forward strategic issues. I refer to the example that Janys Scott gave last week to do with physical punishment in Northern Ireland, where they were not allowed to take a case because they did not have the power. I very much welcome the work that the committee did to secure protection from assault on the purpose of physical punishment in Scotland, which came into force recently. That is very much the type of thing that I would look to use strategically.

It is important to put the matter in context. My office does not have a complaints-handling power. Rather, we have the great work that the SPSO, Rosemary Agnew, and her team do, and judicial systems. We do not have a children's ombudsperson model. My job is not to deal with complaints, but rather to look at how we can use strategic litigation. That links back to some points that were made earlier. This is not a substitute for a child-friendly complaints system or child-friendly justice. There is still a lot more need for support, legal aid and mechanisms for individual remedy, and we should remember the important role that civil society plays. I point to the great examples of Clan Childlaw and JustRight Scotland, which have been leading the way in showing how strategic litigation can work.

An important point is that litigation is a really poor way to address rights violations, so it should be a last resort. The bill's focus on ensuring that rights are respected, protected and fulfilled and on preventing breaches is important, because it means that we should be able to prevent litigation as much as possible. The experience in other countries has been that litigation is necessary only when other things are not working and there has been a failure. Through the broader provisions of the bill, we will look to make sure that breaches do not happen. Under that preventative approach, through all the things that we have talked about, we will look to use the measures of implementation to avoid the need to take cases. However, it is essential that the powers are there to intervene in cases that are before the court and to take cases in our own right where there is a strategic need to do so. I warmly welcome the powers.

On section 7, I refer to the evidence that has already been given on the significant interest test.

Kavita Chetty: My short answer to the question is that we are happy with the approach. It is important to consider who may raise proceedings under the bill, particularly because of all the barriers that children and young people face in raising challenges, which we talked about earlier. It is critical that the Children and Young People's Commissioner Scotland has the power to raise proceedings under the eventual act and has a central role, as Bruce Adamson said, in promoting the rights but also in enforcing them. We fully support that dual functionality.

We want there to be inclusive and broad rules of standing that will allow children and their representatives or advocates and those who seek to advance children's rights to raise actions as appropriate. That would include civil society organisations, multiparty litigation and so on. As you heard last week, it is critical that the victim test that is required under the Human Rights Act 1998, which is quite restrictive in practice, has not been carried into the bill. That is welcome. Instead, we have the usual rules for standing for judicial review actions and the "sufficient interest" test.

Last week's witnesses spoke to the evolving understanding post the AXA case, where the rules of standing were expanded to include those who are acting with genuine concern for the public interest, even in the absence of a private right or interest of their own. That is welcome, as it allows for a more expansive approach to standing, which will allow children and young people and those who represent their interests to raise actions in the courts in a way that protects both individual rights and the broader public interest.

Fulton MacGregor: I note that Rosemary Agnew does not want to comment, as she feels that the subject has been covered. Dragan, do you want to comment?

Dragan Nastic: UNICEF is very happy with this section of the bill. We are delighted that the children's commissioner's powers are being strengthened. In 2016, the UN Committee on the Rights of the Child put forward a recommendation to the Scottish Government that the commissioner's powers should be strengthened, that they should include a power to deal with individual complaints and, importantly, that financial and human resources should be made available to the commissioner to enable him to perform those functions. We hope that the enhanced role for the commissioner under the bill will be fully supported by the availability of all resources that are needed.

Fulton MacGregor: Elin, do you have anything to contribute on the question?

Elin Saga Kjørholt: We do not have such powers in Norway, and what we see is that it is

quite coincidental which cases are brought to court. I think that giving child rights advocates the power to bring cases to court will help to get the right cases to court decisions—strong cases, and relevant ones for children’s rights. I think that that will be very good.

The Deputy Convener: Fulton, will you roll your final two questions together? Alison Harris is still to ask her questions and we have only 15 minutes left for the current panel.

Fulton MacGregor: I have a question on the time limits for court proceedings. I should probably have rolled that into my previous question. If you do not mind, deputy convener, I will ask some of the witnesses to give brief answers on that. Is that okay?

The Deputy Convener: Yes, by all means. I am just asking you to conflate your other two questions.

Fulton MacGregor: I will do so.

On the time limits for bringing court proceedings, the submissions that we have received offer mixed views on whether it is correct to exclude the period when a young person is under 18 when the time limits for raising court proceedings are calculated under section 7. Do any of the witnesses want to comment on that and the overall approach to time limits? We need to have views on that on the record.

Bruce Adamson: I strongly support the approach that is being taken. Where children’s rights have been abused, the time when they are still a child should not be counted. I think that the bill does well in that regard.

The argument is being made that that might place challenges on public authorities to address those matters, but that needs to be set within the context of the balance of power. We know that justice is very hard for children and young people to come by and, often, they may not even know that a rights breach has happened until they are older. The approach in the bill is absolutely the right one.

If there are challenges that have to be overcome, that should be done while favouring children’s rights and moving to an effective remedy. I am pleased with the provisions on time limits, which exclude any time when a child is still a child before the clock starts ticking.

Kavita Chetty: We fully agree with the view that the children’s commissioner has expressed. We welcome the proposal that children be excluded from the requirement that cases be raised within a year, with the clock instead commencing when they turn 18. As we have discussed, there are so many hurdles to a child or young person, in the first instance, recognising any potential violation

that has occurred and then accessing the necessary supports and resources to bring any sort of challenge, so that is an entirely sensible approach and we support it.

The Deputy Convener: We have got some decent views on that on the record. We will go back to Fulton MacGregor, as I am keen to get all the questions in.

Fulton MacGregor: I ask the panel to bear with me, as I will roll together the three questions under the next heading. Under normal circumstances, I would have preferred to ask three separate questions, or at least two.

As you know, the bill requires the Scottish ministers to publish a children’s rights scheme, to report on compliance with the UNCRC requirements and to review and report on it annually. What are your views on that provision? We have had some suggestions that the language in the bill could be stronger. How do you feel about that?

My second question is related to that. Should the scheme have a clear commencement date? We heard pretty strong views on that last week.

My final question is about child rights and wellbeing impact assessments. I would like to hear your views on the legal duty on Scottish ministers to prepare such assessments for legislation and decisions of a strategic nature. To what extent should ministers have discretion on that? I would appreciate your views on that. I am sorry that I had to ask those questions quickly. I hope that you will be able to answer each of them as you see fit.

The Deputy Convener: I note that Rosemary Agnew has posted in the chat that she also supports the views that Bruce Adamson expressed on the previous question.

Bruce Adamson: Those were three really big questions. I am aware of the time so, again, I will take the opportunity to write to you with further information.

It is important that we have commencement on the face of the bill. Tomorrow will be the 31st anniversary of the convention, and children have been waiting a very long time for this. Public authorities have already had the obligations for a long time via state responsibility, and they have had specific duties since the 2014 act. I note that the Convention of Scottish Local Authorities has pointed in its evidence to the great work and knowledge that already exists on children’s rights and the human rights agenda, so there is no need to delay.

I favour immediate commencement being put into the bill, because there is no justification for delaying. I am pleased that we have a really

strong bill and we can improve it through the parliamentary process, but rights need to be real.

Scotland's first children's commissioner, Kathleen Marshall, raised the issue when the office was created back in 2003 and 2004, and those who were children then are now adults. The 2017 Scottish Youth Parliament campaign was called "right here, right now" for a reason. Children have waited for long enough. Six months may not seem a long time to adults, but we should think about it from the point of view of children.

Just this week, I received an amazing video, which I think is also being sent to the committee, from Holy Cross primary school. One of the strong things that the children talk about is how excited they are about the bill, but it needs to be in force. One of my young advisers said that, if the bill is passed and not commenced immediately, it will confuse children and young people as to whether their protections exist or not. My very strong view is that commencement needs to be as soon as possible. I would favour immediate commencement, but there should be no further delay. Children have waited long enough.

I think that the children's rights scheme obligation can be strengthened. Some good examples have been given in this session and in the previous one about some of the things that we need to see in it, particularly on child-friendly justice, but we have commented extensively on that already.

Child rights impact assessments were the theme of the European Network of Ombudspersons for Children's thematic work for the past year. That culminated in a three-day conference that we have just hosted on child rights impact assessments—via Zoom, unfortunately, and not in Edinburgh. We therefore have a high level of knowledge of the situation across the Council of Europe area. We can make available ENOC's position statement and the common framework of reference that was developed, which we will be promoting with Government and public bodies.

Impact assessments are a vital tool in ensuring that decisions are made effectively, but I think that it is worth noting in the brief time that we have available that the experience across Europe is incredibly variable. One of the concerns from some of the countries that have made impact assessment an obligation for all levels of decision making is that there is a risk of straying into tokenism and bureaucracy. The key to effective impact assessments is their quality, so training and support need to be in place.

If there is an enforceable legal obligation on people, it places a strong emphasis on making sure that decisions are made effectively, and child

rights impact assessments are a powerful way of doing that. We strongly support them. It is important that there is a legal obligation on Scottish ministers. Covid has shown us some really good examples of how poor decisions can be made if there is a lack of impact assessments. We strongly support them and the way in which they have been drafted into the bill. Again, we can expand on that in writing to the committee.

10:00

Kavita Chetty: I emphasise that the requirement for the scheme and for reporting on both steps that have been taken and plans is an important means of ensuring that children's rights are advanced in practice, and we welcome it as an innovation from the Human Rights Act 1998 model.

I will briefly mention two issues in relation to the scheme. First, section 11(3) sets out what "may" be included in the scheme. To amend that "may" to a "must" would be most welcome as it would ensure that the issues really are looked at in practice.

Secondly—I think that I have talked about this before—we recommend that the list of what is included in the scheme be expanded. It could usefully include, for example, arrangements by Scottish ministers to improve children and young people's access to justice through child-friendly complaints mechanisms, advocacy and representation. The scheme currently talks about awareness raising and promotion of children's rights. We believe that it should also mention the advancing of children's rights, education and training as another important element. Those are two brief comments about the scheme.

It is important that the bill has a specified commencement date that is as soon as is practicable, rather than it being left to ministers' discretion. We recognise that duty bearers will look for a preparation period, but the UNCRC has been part of our international obligations for a long time and public authorities had a duty placed on them under the 2014 act, which put them in a good place to prepare for the bill. The experience of Covid-19 has arguably accelerated the need and the case for advancing the obligations in law sooner rather than later, and for systematically building that into decision making. That case has never been made clearer than by the experience over the past months.

Rosemary Agnew: I will not add anything to the discussion about commencement, but I would like to add a point about impact assessments, which is to do with implementation.

Impact assessments are a great way of ensuring that there is build-in in policy making and

decision making from the start. The Scottish Public Services Ombudsman is a public body, and I already do a data protection impact analysis and equalities impact analyses. To pick up on Bruce Adamson's point, we need to be very careful that we do not introduce another silo of an impact analysis that ends up considering things that are divorced and separate from each other. We need to ensure that the approach is not too bureaucratic, that there are support and guidance about how to do the work effectively, and that resources are available for public bodies so that we have a meaningful approach rather than a tick-list approach.

Dragan Nastic: On commencement, we are very happy with the Scottish Government's commitment that the act will enter into force as soon as possible. As an intergovernmental organisation, UNICEF does not tell Governments or Parliaments what they should specifically do. Every country takes its own path according to its tradition and system. In Iceland, for instance, the incorporation act went into force immediately but, in Sweden, there was a delay of a year and a half for entry into force to allow duty bearers—especially the judiciary and local authorities—to prepare for implementation. I hope that the Scottish Parliament will find a consensus with all stakeholders.

We think that the children's rights scheme can be strengthened in two ways. First, the current formulation that the Scottish ministers "may" include arrangements should be strengthened, perhaps with the word "should" or "shall". Secondly, we think that the list of issues to be included in, or arrangements to be added to, the children's rights scheme can be and should be expanded.

We are delighted to see a mandatory child rights impact assessment for the Scottish Government. That is a point at which the incorporation bill goes further than anywhere else in the world does.

An area for improvement relates to strategic decisions. We think that the approach is a bit vague, broad and open to a subjective, discretionary assessment, and we would recommend—apologies for this—using the formulation in the child rights impact assessment process and template used by the European Commission, which was developed by UNICEF.

The Deputy Convener: I am very sorry to hurry you, but we have more questions and only five minutes or so left for the whole panel. If you could draw your remarks to a close, that would be very helpful.

Dragan Nastic: My suggestion is that a child rights impact assessment must be done for every

decision that has a direct or indirect impact on children. Thank you.

The Deputy Convener: I apologise for cutting you off.

Elin Saga Kjörholt: I can leave my comments on that, as the issues have been covered.

Alison Harris (Central Scotland) (Con): Good morning, panel. I want to discuss incompatible legislation. Part 4 of the bill sets out the significant powers in respect of incompatible legislation. Do you want to make any comments on part 4 of the bill? We are particularly interested in your views on the approach to the courts' declaratory powers and the reporting duty that is set out in section 23.

Bruce Adamson: We think that part 4 is useful. In particular, we think that the strike-down declarators, section 19, which is on the interpretation of legislation and allows courts to read down incompatible parts of legislation—that is very useful—and the incompatibility declarators are useful. We understand the Government's reasoning on the powers that are available to the devolved Parliament and the restrictions on it, although there is, obviously, a much stronger power to strike down.

The ministerial reporting is really important, because we see, particularly from experience in international fora such as the European Court of Human Rights, that the execution of judgments and implementation can be very slow. The reporting duty is therefore very useful. Again, I refer to section 22, which requires my office to be notified when such proceedings are taking place and provides for the opportunity to intervene in those cases. That is a really important additional power for us, so we strongly support what is there, with the understanding that the argument is that that is as far as we can go within devolved powers. We would like to see strike-down powers in relation to both past and future legislation.

Kavita Chetty: The approach that is taken in the bill to the strike-down declarator for incompatible provisions that predate the act and the incompatibility declarator for incompatible provisions that post-date the act is most interesting. In a Human Rights Act 1998 context, a declaration of incompatibility has been found not to be an effective remedy where the incompatible provisions effectively remained on the statute book and no action has been taken to secure compatibility.

We understand the reason for the incompatibility declarator, which is to ensure that we remain within the competence of the Parliament. In an ECHR context, to meet the threshold of an effective remedy, there needs to be a long-standing and established practice of giving effect to the court's declaration of incompatibility. It

needs to be acted on effectively to remedy the incompatible legislation.

What is really different and interesting about the bill is that it is supported by further measures to secure compliance in practice to ensure that an effective remedy is provided for through the impact assessment, the statements on compatibility, the requirement of the ministers' report and the remedial power. We think that, viewed as a whole in conjunction with those other measures, that approach goes some way to providing for an effective remedy under the legislation, subject to the comments that I made earlier about the need to evolve remedies in our courts and look at more structural remedies to deal with those issues of a systemic nature that affect multiple people.

Rosemary Agnew: [*Inaudible.*]—comment on reporting. It is absolutely critical that there is reporting, but we need to be very clear about what we expect to see in the reporting mechanism and to focus on not just what we have done but what we have learned.

Dragan Nastic: We are very happy with that part of the bill, and we think that the measures that are envisaged will ensure that future legislation is in line with the convention. It is vital that the review of existing legislation starts as soon as possible. Scotland can expect the UN Committee on the Rights of the Child to ask the Scottish Government in February next year when it plans to start conducting a review of legislation following the incorporation. That has happened in Norway and Sweden. As a result, a number of existing pieces of legislation have been amended to make sure that they are in line with the Convention on the Rights of the Child.

The Deputy Convener: Does Elin Saga Kjörholt want to comment?

Elin Saga Kjörholt: [*Inaudible.*]—perfectly, so I have no further comments.

Alison Harris: I want to ask about resources and costs. Do you have any comments to make on the potential impact on resources and the cost of the bill to your organisation, to public authorities generally, and to the third sector?

Bruce Adamson: I am aware of the time.

As others have commented, the experience in other countries is that there has not been a significant need for additional resources. I point to article 4 of the convention, which focuses on using available resources to the maximum extent possible. I also strongly refer the committee to, and endorse, the work that the Scottish Human Rights Commission has been doing on human rights-based budgeting. There is a lot of work on children's rights-based budgeting that shows that taking a rights-based approach leads to better and

more cost-effective decision making in the long term. Although it is important that there is proper resourcing to make sure that awareness is raised, that is already a function and an obligation of the state. We should be spending that money anyway, even if we did not incorporate, and that is money very well spent. The obligation to make sure that people are trained and understand and that children are educated on their rights pre-exists the bill, and the money that is spent on that is very well spent. More focus on human rights-based budgeting and children's rights-based budgeting is very useful.

There are additional powers for my office in the bill. We set that very much within our general duty to safeguard and promote the rights of children and young people. I could happily talk to the committee about how, per capita, those in my organisation are funded a lot lower than colleagues in Northern Ireland and Wales are, but that is perhaps a discussion for another time.

Our approach to the use of our powers under the bill is very much the same as that which we have taken so far, which is to use a strategic approach. I foresee that, if there was consistent failure by public authorities, the cost of using the litigation powers would increase over time, but my hope is that using the mechanisms in the bill to deliver change will be very cost effective and save money in the long run. If we end up spending money on litigation, something will have gone very wrong in the way in which the bill and the obligations that sit underneath it have been implemented.

The Deputy Convener: If Dragan Nastic and Elin Saga Kjörholt are okay with this suggestion, I will ask only Kavita Chetty and Rosemary Agnew to answer this question, because it is specifically about Scottish organisations' resources for implementing the measures. Kavita Chetty, in a nutshell, does the Scottish Human Rights Commission need more resources for the bill?

10:15

Kavita Chetty: In a nutshell, as the bill stands, we would not need more resources, particularly to implement it. The Children and Young People's Commissioner Scotland would be resourced through Parliament to do that.

I endorse the children's commissioner's answer. On public bodies and resourcing, it is really important to understand from a human rights law perspective the underlying obligations that public bodies are being asked to fulfil. They can be assured that the framework to a large degree fits with their existing priority-setting, budgeting and policy-making processes. It is about building

children's rights and considerations into those processes.

I am sorry—I am aware that we are running out of time.

Rosemary Agnew: I have a general comment to make. I do not think that anything ever comes completely for free. We should encourage reuse, use current resources well and encourage creative solutions. In the early days, the greatest impact for my organisation is likely to be in giving support and guidance and in developing complaint processes that public bodies can deliver and that will not—I hope—end up with the requirement to go to an ombudsman or a court.

The Deputy Convener: Does Alison Harris have anything further to ask about? Unfortunately, we really have to end this discussion.

Alison Harris: I had a brief question about going further with the bill, but I am happy to leave things as they are.

The Deputy Convener: We will draw the session to a close, if that is okay.

I thank the witnesses for their comments. The session has been extremely helpful. I give particular thanks to our international visitors.

I will suspend the meeting briefly so that the panels can change. We will reconvene as soon as everyone is in place.

10:17

Meeting suspended.

10:18

On resuming—

The Deputy Convener: I welcome the witnesses on our second panel: Eddie Follan, chief officer, children and young people, Convention of Scottish Local Authorities; Assistant Chief Constable Gary Ritchie, partnership prevention and community wellbeing, Police Scotland; Alistair Hogg, head of practice and policy, Scottish Children's Reporter Administration; and Mike Burns, assistant chief officer for children's services and chief social work officer, Glasgow city health and social care partnership. Thank you for being here this morning.

Unfortunately, our time is limited. We are hoping to wrap up by about 25 to 12, so I ask questioners and panellists to be succinct in their questions and answers. When you are asked a question, please pause briefly so that the microphone and camera can pick you up.

I have two questions, but I am happy to roll them into one general opening question. There is

strong support for direct incorporation of the UNCRC into Scots law. What do you think of the Scottish Government's general approach in the bill, and what guidance will public authorities need to ensure that they meet the duties that are set out in the bill? I will go to Eddie Follan first.

Eddie Follan (Convention of Scottish Local Authorities): Thank you, convener. The first general point is that we very much welcome the bill and the principles in it. We have discussed it extensively with COSLA's education, children and young people thematic board, which is made up of the 32 conveners of education and children's services in Scotland, and there is full agreement with and support for the bill. We want to make sure that children's rights are realised across public services.

We have also had extensive discussions with local authority partners, including chief executives through the Society of Local Authority Chief Executives and Senior Managers, the Association of Directors of Education in Scotland, Social Work Scotland and the Scottish councils equality network.

In general, we very much support the principles of the bill and the approach that it takes. There are challenges, and we can go into some of those. The local government workforce is some 250,000 people strong, so there is a challenge there, but it is one that we are certainly up for taking on.

We were clear in our submission that we need guidance that is developed in partnership with us, that builds on best practice and that looks at what is in place and works at the moment. We also need to make sure that that guidance is fully consulted on and fully informed by the views of children and young people.

It would also be useful to make sure that the guidance makes clear where the convention sits within the wider legislative framework in Scotland. There is a lot going on at the moment, with the Age of Criminal Responsibility (Scotland) Act 2019, the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill, as well as this bill on incorporation of the UNCRC. It is a complex landscape, so the guidance needs to be clear and strong.

Having consulted our partners and the Society of Local Authority Lawyers and Administrators in Scotland, we think that, if necessary, there is also a case for the guidance to be statutory. There is a view in local government that that would be helpful.

I hope that that was concise enough.

The Deputy Convener: It was—I am very grateful to you. ACC Ritchie is next.

Assistant Chief Constable Gary Ritchie (Police Scotland): Good morning, and thanks very much for the opportunity to participate.

Police Scotland is, of course, fully supportive of the principles behind the bill. As you know, Police Scotland has a children and young people plan. We have set up a short-life working group to provide direction and leadership on the bill throughout the organisation, even at this early stage. We already have other working groups in place for similar legislation—the Children (Equal Protection from Assault) (Scotland) Act 2019 and the Age of Criminal Responsibility (Scotland) Act 2019, which Mr Follan mentioned—so we are fully committed, fully positioned and ready to progress, as we are required to be.

Our asks are very similar to those of Mr Follan. As we progress, detailed guidance will be important in respect of expectations. A consistent communications plan is needed. As we have seen recently in the engagement with Government on the coronavirus legislation and linked legislative instruments, there is value in the strong collaboration that has developed around the bill, which has helped to drive the understanding of implications, obstacles and practicalities, all of which are important for all sides to understand. It is really important that that dialogue continues and that Police Scotland remains fully represented should any governance structures be put in place.

The Deputy Convener: Thank you very much. I will bring in Alistair Hogg.

Alistair Hogg (Scottish Children's Reporter Administration): Good morning, and thank you for inviting us to give evidence today. I represent Scottish Children's Reporter Administration, which very much welcomes and supports the bill. As an organisation, we are of course very focused on children's rights—they are core to our business, as are the protection of children and upholding their rights.

We have always considered that we have a duty to comply with the UNCRC, and we always strive to do so. In incorporating all of the UNCRC, the bill raises the prominence of the convention and offers a real opportunity to bring about the cultural change that is required to promote and enshrine children's rights in every part of Scottish life. We are very supportive of the bill and what it is trying to achieve.

Key to driving that cultural change forward is the opportunity for enforcement rights that exists within the bill. I am not necessarily saying that we hope that those rights will have to be used all that often, but having them in the bill is absolutely key to driving and motivating change.

On our asks, as the previous two contributors have indicated, any guidance documents would be

very welcome. Although observing children's rights is core to our business, there is always a lot to learn and understand. One of our duties—we have already started to do this—will be to consider all the work that we currently do and all our policies, procedures and processes to make sure that they are compliant with the UNCRC. The provision of a toolkit or an audit framework would help us to undertake that work to the full extent.

The Deputy Convener: Thank you very much. I will bring in our final witness, Mike Burns.

Mike Burns (Glasgow City Health and Social Care Partnership): Thank you, convener. Good morning to the committee and to the other witnesses.

I certainly echo the points that have been very eloquently made. In a sense, the bill builds on the bedrock of the Children (Scotland) Act 1995, which encapsulates quite a number of the UNCRC's articles, and the getting it right for every child policy direction, which we have been implementing in Scotland since 2006. It is important for us as a society to continue to promote, protect and develop children's rights. I think—[*Inaudible.*]*]*—to welcome that, and I echo the point about how that is stretched across the public sector and statutory organisations, which is important.

The point about guidance is significant, because there is a need to consider alignment, co-ordination and cohesion. The bill very helpfully outlines all the legislation that continues to impact on children's services, and I think that there is a need for significant co-ordination in relation to the guidance. I do not think that it is sufficient just for guidance to come out separately—it has to be cohesive.

The Deputy Convener: Thank you.

Before I bring in Mary Fee, I have a question for ACC Ritchie. We know that the Age of Criminal Responsibility (Scotland) Act 2019, which you referred to, still has not been implemented. We are told by the Scottish Government that that is in part down to Police Scotland's need for training and understanding. Could you explain where the blockage is and whether there might be a similar blockage with the implementation of the bill?

Assistant Chief Constable Ritchie: I think that the issue is the scope and challenge of implementation and the need to understand what that means in terms of the range of legislation that we have to consider daily. When police officers deal with a child as part of their duties—whether the child is a potential victim or a potential offender—they may need to consider five or six pieces of legislation that define "child" in various ways, with the age being between 16 and 18. That is one element.

The second element is about the practical implementation of the legislation. There are numerous systems across Police Scotland, as you will understand. I am not a technical person, but many of those systems have default settings that trigger other processes, and they are all set up for a child being under the age of 16. If that is raised to 18, all of the systems will need to be adjusted, as will our policies, processes and operational practices.

The legislation will bring significant change. I would hesitate to say that there is a blockage. As I say, we are fully committed to ensuring that the legislation is implemented in the intended manner—

10:30

The Deputy Convener: I am sorry to interrupt you, but the legislation will increase the age of criminal responsibility from eight to 12—it is not about the confusion as to whether somebody is an adult at 16 or 18. Do you have any line of sight on when that legislation will come in?

Assistant Chief Constable Ritchie: Another functional area is working on that at the moment. I am sorry, I—*[Inaudible.]*

The Deputy Convener: We will move on, if that is okay. We can speak to other colleagues in Police Scotland about that specific point. I am sorry to buttonhole you on that.

Mary Fee: Good morning. I have two questions for the panel. The first is on section 4 of the bill, on the interpretation of the UNCRC requirements. Does the panel think that that section should be expanded to take account of general comments and concluding observations or any other opinion on international human rights treaties? Would there be any unintended consequences if the bill were to be amended in that way?

Eddie Follan: Good morning, Ms Fee. To be perfectly honest, we do not have a strong view on that. I might have to ask other colleagues about the issue.

I think that anything that strengthens the bill would be welcomed by local government. We have been focused on the higher level—the resources issue and making sure that the guidance is strong. I do not want to mislead you by giving a false steer on what we think, but certainly if something would strengthen the bill and would be in the best interests of children and young people, I am sure that my colleagues would support it. My colleague Mike Burns may have another view.

The Deputy Convener: My apologies—I have had some technical issues with wi-fi drop-outs, so

forgive me if I sound rusty. ACC Ritchie, could you answer Mary Fee's question, please?

Assistant Chief Constable Ritchie: My answer is similar to Mr Follan's. I do not know that it is for us to comment on the issue, other than to say that I think that you get the best legislation from the widest consultation.

Alistair Hogg: I watched the earlier session, which gave the committee rich information on the question; you also got further information from last week's meeting. From my perspective, I think that it would be helpful for courts and tribunals to have access to any guidance or information that comes from those sources. I align myself with Janys Scott's comment last week that all of that information would enrich consideration of the issue at hand, although it would not be binding on a court or tribunal. That is an important point: if the courts and tribunals were to be bound by those sources, that would greatly increase complexity and influence. However, I think that it would be helpful to be able to consider them.

Mike Burns: It is a very legalistic and technical issue. I do not have much detail to add to the debate, other than to comment on the promotion of the values. The values have to challenge the professionals who work in this arena. That is about enacting not just the law but the spirit of the law in the everyday interactions that we have with children. From that perspective, it is about the promotion of that approach.

Mary Fee: My second question is on the definition of a public authority. If panel members listened to the earlier session, they will know that there was a fairly lengthy discussion about what the definition of a public authority should be. I am keen to hear your view on whether that definition needs to be changed to include some of the private sector bodies that carry out public functions.

Eddie Follan: Again, in consultation with our members, we are content with the definition of public bodies as it stands. However, there are clearly issues with the bodies that deliver those functions. I was not able to listen to the first panel, but I know that there are a lot of complexities around how it would be done. It is also an issue that may be addressed in guidance on the legal duties of public bodies as they stand. COSLA is comfortable with the legislation as it stands for public bodies, but we are open to a discussion on how it could be extended, if that helps.

Mary Fee: That is helpful. Thank you.

Assistant Chief Constable Ritchie: I am in danger of just saying what has been said for every answer. The purpose of the bill is to effect a cultural change. I am probably straying into a personal view here, but I think that, if we are going

to have cultural change, accountability should be as wide as possible. It is not for me to say whether that is achieved by widening the definition of public bodies.

The Deputy Convener: Thank you. There is no obligation on witnesses to answer any of the questions.

Alistair Hogg: In previous sessions, there was a question—I think that it has been cleared up, but I want to make the point absolutely clear—about whether children’s hearings would be considered to be public authorities.

Mary Fee: Yes, there was.

Alistair Hogg: I can speak on behalf of my organisation in saying that we have absolutely no doubt that we are a public authority and would be covered by the bill. I am pretty confident in saying that our close partner, Children’s Hearings Scotland, would have a similar view.

On the wider issue of the definition of a public authority, the area that was explored was private providers and privatised services and so on. There was a very good submission earlier—I think it was from Rosemary Agnew—suggesting that, if you were carrying out a public function, you should be covered by the expectation to observe the UNCRC. That is an approach that the SCRA certainly supports.

Mary Fee: If you are content with the definition, do you think that it would be helpful to you if there were almost an explanatory note listing who a public authority would be?

Alistair Hogg: Such a note can sometimes be helpful, because it can remove any doubt about areas in which there is doubt. I suppose that there could be a disadvantage in that there would have to be an exhaustive list and it would continually need to be update and reviewed. There could be an advantage in having increased clarity.

Mary Fee: Thank you. That is helpful.

Mike Burns: Similar to Mr Fallon, we are content with where the law sits at the moment. Similar to the points that have been raised, I think that, if the bill is about promoting these rights, we need to look at promoting them across society and communities, and also among parents, as an evolution. You want to get the public bodies right first, where they are holding statutory duties, but also allow the legislation to evolve into those other areas, as it should do, where hopefully, by best practice, the points that have been made earlier—*[Inaudible.]*—can meet and understand the philosophy around the promotion of the child’s rights and the child’s views. We are content at this stage.

The Deputy Convener: Mary Fee, do you have more questions?

Mary Fee: No, thank you, convener.

The Deputy Convener: In that case, I will bring in Fulton MacGregor.

Fulton MacGregor: Does Alison Harris want to come in here to finish off this line of questioning?

The Deputy Convener: My apologies. Alison Harris, you are welcome to come in, and I will bring you back in at the end as well.

Alison Harris: Thank you, convener.

Would the witnesses like to comment on the time limit for bringing court proceedings, and will an extended timeline be an onerous burden of record keeping, as is suggested by the Faculty of Advocates?

Eddie Follan: Again, I am in danger of saying that that is not an issue that we have considered in detail. I go back to our position on support for the bill. If our partners in local government are very supportive of the bill as it stands, it is not an issue that I want to comment on in any detail.

Assistant Chief Constable Ritchie: To be brief, it is not something that we would necessarily comment on.

Alistair Hogg: There are possibly two elements to the question, but I can clarify that. I know that there was quite a bit of discussion in previous sessions about the timeline and whether you count in any calculation of that timeline the time up to the age of 18. Is that part of what you are asking, or are you asking just about the record keeping for that?

Alison Harris: No, it is part of it.

Alistair Hogg: Thank you. As I said earlier, I observed the previous sessions, in which some very interesting views were put forward. A very clear view was expressed earlier from the children’s commissioner about that and I absolutely agree with those sentiments.

However, I also understand the point that Janys Scott made in a session last week, which was simply explaining the practicality of that. Although of course it is unfair and not right to constrain a child with similar time limits to those of adults, the remedy that is being sought may require something to be done quicker than that. There is a practical impact involved but, on balance, it is the right thing to do with those timelines.

It is an interesting question about maintaining of records. Our organisation has a retention policy that allows us, or expects us, to delete our records once the young person reaches the age of 18 unless there is an exceptional reason why we

should hold on to those records. If there was a timeline that went up to a year after their 18th birthday, that would have the implication for us that we would need to hold records until they reached the age of 19 and potentially longer if there were on-going proceedings.

10:45

Mike Burns: I concur with the earlier evidence that you heard about a very reflective and supportive approach to the time limits and the time bar. I think that that absolutely makes sense, particularly when you are dealing with children for whom there might be a need for redress or a need from childhood trauma to take account of that.

I go back to the issue about the Children (Scotland) Act 1995. Legislation since has strengthened—*[Inaudible.]*. There may be a challenge with the quality of record keeping. In looking at how we enact children's rights, information technology systems for recording across Scotland require considerable resource. In a small country such as ours, a significant degree of consistency would be helpful rather than the variations that we have at the moment.

There are well-accepted record retention practices that we adhere to. It is about holding records on adoption, fostering and looked-after children for decades. Even now, we have a considerable number of people coming back for redress. It is something that we need to promote as part of this on the record keeping, but the record keeping then becomes critical in capturing the view of the child, the best interests of the child and the professional decisions that are taken on them. It is a helpful question, which raises the issue of resources.

Fulton MacGregor: I have a couple of questions on part 3 of the bill. First, what is your view on the provision for the Scottish ministers to prepare a children's rights scheme, and could you comment on the suggestion that we have heard that the language in the bill could be stronger? I want to hear any thoughts on that. Is there anything that should be added to the contents of the scheme? In this area, could I ask the panel, as I asked the previous panel, to comment about the scheme having a clear commencement date?

Eddie Follan: Thank you, Mr MacGregor. I caught this bit in the previous panel and I think the duty to—*[Inaudible.]*—on the scheme is welcome. Anything that we can do to strengthen that is welcome as well. Our view from local government is that that is necessary. We know that it will be something that would be valued by children and young people.

We probably differ a bit from the children's commissioner on the commencement date. We

certainly welcome the three-year implementation period, but we need to think about when is the right time to commence. As I said earlier, we have a workforce of some 250,000 people in local government, and there is the wider public workforce beyond that. We need to be focused on building capacity through training and making sure that everybody is aware of the legislation and their responsibilities under it.

We have had long discussions about this and there is a real awareness of children's rights in children's services and in education. Children's rights are well embedded in those services through GIRFEC and have been for many years, and there is a lot of good practice across local authorities. It is fair to say, and we recognise, that there may be less awareness of that in other areas of the workforce, but there is some really good practice. In North Ayrshire, there has been some amazing work on embedding children's rights across the workforce.

In a long, roundabout way, what I am trying to say is that we need to be cautious about commencement and bringing this in right away. We need to keep focused on implementation and make sure we get it right rather than rush to a commencement date. I understand what Bruce Adamson was saying about needing to do this now, but we have challenges. There is no doubt about that. We have challenges in making sure that the workforce is fully aware of what they have to do. I would be cautious about commencement right away, but let us focus on implementation and getting that right.

The Deputy Convener: Before I bring in ACC Ritchie I would like to push back on that answer. We heard from the previous panel that local authorities and public bodies are required—they have a legal duty—to have awareness of the UNCRC. I want to know why, given that they have had that duty for six years, it feels from your answer as though we are at base camp in terms of getting everyone ready to understand what incorporation means. Surely, awareness exists through that duty having permeated through every local authority and public body in the country already.

Eddie Follan: That is a fair point. The feedback that we hear is certainly that there is awareness, but I think that we can always do more. Once we have a system, or remedy, through the bill, we do not want it to be dragged in right away; we do not want to be in adversarial situations straight away, but to make sure that everybody knows what their responsibilities are.

We are obviously living in very challenging times. Public bodies have been under a fair amount of pressure, through local authorities responding to Covid-19 and the pandemic. It is a

challenging time for local government—there is no doubt about that—and it is a challenging time for everybody, including children and young people and families.

The discussions with our local government partners have been about making sure that we get the legislation in and that we get it right. Let us not rush right away to setting a commencement date for as soon as the bill is passed. That is in no way to say that we should not commence it as soon as possible.

The Deputy Convener: Thank you for that. Obviously, commencement is not full implementation. Commencement starts the implementation—[*Inaudible.*]

I will move on. I bring in ACC Ritchie to answer Fulton MacGregor's question.

Assistant Chief Constable Ritchie: Again, I will give a similar response. Going back to what I said at the start, it is important to have guidance on and demonstration of what will be required. The commitment from Government, through the children's rights scheme, will be helpful in demonstrating and building our leadership mechanisms for what we have to do internally; it gives us a good overlap, lock-in or however you want to describe it. We are fully supportive of that.

I take Eddie Follan's comments about timescales in a constructive way. It is important that we know what the timescales are and what is expected at each stage, so that we can build and prepare our processes. Whether it is three years to commencement and another period for implementation, or three years to implementation, it is much more important that we know what the expectations are and what role we will play in response to that, and when, so that we can plan appropriately.

I know that this was not addressed to me directly, but on the deputy convener's pushing back on the answer about the time that public services have had, it is fair to say that there has been awareness. The practical detail, of which we will gain a better understanding in the months ahead, is important for understanding how incorporation will impact on our officers and communities and what will be the resultant demand on services. That is important.

Alistair Hogg: The first part of the question was about the children's rights scheme and whether there is a need to consider strengthening it. Previous contributors suggested some areas in which it could be strengthened. The children's rights scheme is absolutely key to the successful implementation of the bill and to what it is trying to achieve. It is important that the scheme is made as strong as it can be.

There have already been some good suggestions on how to strengthen the scheme. In respect of what might be added to the children's rights scheme, what is already in the bill covers quite a lot and could be stretched to cover more. We have heard that a way in which it could be strengthened is in enabling children and young people to access relevant support—in particular, by enabling access to advocacy and legal aid in order to obtain legal representation. Those areas could be considered by the committee. The children's rights scheme will absolutely be a key driver of success.

On commencement, I am probably somewhere in the middle. I completely agree with what the children's commissioner said: children and young people, having seen the bill coming and having welcomed it, will expect that it will be commenced when it is passed. However, I can also see that many public services will require a bit of time. I totally accept the deputy convener's point that we should already be ready; to a large extent, that is correct.

As I said earlier in my submission, the SCRA has always considered itself to be under a duty to comply with the UNCRC. We would not wish to be complacent, either in thinking that we are fully compliant or that we could not comply even further with the UNCRC. We would like to conduct a proper audit of all of our processes, functions and policies to ensure that we are there.

Eddie Follan made the good point that, in a normal time—if you can think back to what normal times were like—it would be perhaps more straightforward to consider placing a tight timescale on commencement. However, we are still in the middle of the pandemic and are trying very hard to come out of it and recover from it. So I can say, speaking for the wide range of public services that will have to comply with the duties, that there will have to be cognisance of that.

We are in favour of a commencement date being stipulated, because that will be a driver for implementation. Without one, there is the danger of unintended drift. The deputy convener mentioned an example in which there has been some drift. It is such an important bill that to allow such drift would not send a good message to children and young people.

11:00

Mike Burns: On the children's rights scheme and language, one of the things about the independent care review that was commended was the conversion of the original "The Promise" into "The Pinky Promise". I think that it is important to ask how the bill, even by itself, will be converted into messaging to young people.

On the commencement date, the deputy convener used the phrase “push back”. You are probably highlighting the scale of the legislation that we have been asked to absorb. Even taking the Children and Young People (Scotland) Act 2014—[*Inaudible.*]—certainly within my own service, our ability to get into the detail of that. I am responsible for 2,000 staff in health visiting, specialist children’s services and social work, which means that the devil is in the detail.

Also, we work in an integrated way in localities, so there has to be an opportunity for key partners—social work, education, health, the third sector, Police Scotland and SCRA—to come together to ask what the issues are. I think that three years will allow us to implement properly, on the bedrock of best practice.

Fulton MacGregor: Thanks to the panel for those answers. My second and final question is about child rights and wellbeing impact assessments. What are your views on the legal duty on the Scottish ministers to prepare assessments in developing legislation and making strategic decisions? Will you also comment on the extent to which ministers should have discretion in making strategic decisions?

Eddie Follan: We know that child rights impact assessments, and impact assessments, are, in general, now much more a feature of service delivery than they were previously. As I said before, we can always improve, we can always get better and we can always do more on that. That duty is absolutely right and I support it. We are getting much better at doing impact assessments when we are designing services at a local level. Crucially, we are getting better at doing them with children and young people, as well. Again, however, I say that we can always do better.

I will pass on the second question and not make any comment at this stage, but I hope that my answer to the first is helpful.

Assistant Chief Constable Ritchie: I, too, will pass on the second question.

On the first question, Police Scotland has strong equality and health impact assessment processes in place. We did a bit of work earlier this year with Bruce Adamson, at the advent of the coronavirus legislation and the policies around that, on developing a process for children’s rights and practices. As you can imagine, that follows similar lines. We absolutely see the critical nature of assessments and we will be well positioned, should it become compulsory, to build that into our policies and processes.

Alistair Hogg: Impact assessments are something that we, in the SCRA, have been gradually getting used to. We already have in place a significant process of equalities and

human rights impact assessments for policies and new processes that we develop. We welcome the expectation around child rights and welfare impact assessments, and we see great benefits in their being applied whenever any new policy or law is being considered. They uncover areas that might be overlooked but which need to be considered, so we very much support them.

I recall some comments that were made in the earlier session today. The impact assessment landscape is populated at the moment with equalities impact assessments, human rights impact assessments, highlands impact assessments and other impact assessments, so it can become a complex landscape. The SCRA would like to have an overall assessment that brings in all the elements that we need to consider. Children’s rights and welfare would be absolutely central to that, so we very much support assessment.

Forgive me—I did not understand the second question, and I am not sure that I am able to answer it. Can you clarify what was being asked?

Fulton MacGregor: It might be that you do not feel inclined to comment, but I was asking for your thoughts on the extent to which ministers should have discretion in making strategic decisions. Should ministers have discretion in that? My question relates to some of the evidence that we took last week.

Alistair Hogg: Thank you for explaining that. I will not comment on that issue, if that is okay.

The Deputy Convener: That is fine.

Mike Burns: I concur with the comments that have been made about the need for the right impact assessment and in relation to the previous question about implementation. In Glasgow, and in the social work profession, we have made the same point as Susan Deacon: there is far too much time and attention on planning and not enough on delivery. The focus needs to be on delivery, implementation and what needs to take place in order to promote best practice. At the end of the day, the promotion of children’s rights—[*Inaudible.*]—by and large by adults. The issue is about how that then occurs across adult services. We need to be in a position of being able to challenge each other, so I agree with that.

On the second question, I, too, consider that that is probably not for me to comment on.

Alison Harris: I would like to discuss resources and costs with you. Do you have any comment to make on the potential impact on resources and the cost of the bill to your organisation, to public authorities generally and to the third sector?

Eddie Follan: You will have seen from our evidence that we have concerns about the

resourcing of the bill. The financial memorandum talks about a three-year implementation programme with a £2.1 million package of funding for all public bodies to accompany it, with the costs largely being for training.

I say again that there needs to be parity. We have 250,000 people working for us in local government. We cannot leave the work to children's services, social work and education; this must also be about housing, transport and all other parts of the public sector. I am sure that colleagues in the police and in other areas would agree.

In the social sector, we are a bit concerned that we would need more support to build that capacity. We want to link the resources to capacity. However, it is tricky to put a price tag on that.

We have had some discussions with the Scottish Government on resources. We have agreed that we will keep an eye on the issue and that we will work together as we progress through the implementation period, to make sure that we are getting it right. We do not want to undermine everything that is good about the bill by not putting in the resources that will support it.

We have some concerns, but we have had some discussions with the Government and we have a commitment from it to keep talking about resources and to move forward in that way.

Assistant Chief Constable Ritchie: My answer might sound a bit negative, but I emphasise that we are absolutely committed to working with partners and with the Government to address the issues in support of implementing the bill in the most effective way.

It is difficult to say exactly what the impact will be. If I take resources and costs separately, it is difficult to say what the impact of any new legislation will be until we see the details and understand how it is taken on, how it is accepted by the public and what that does to demands on policing.

However, I think that the impact of the bill will be significant in a lot of different areas. First of all, there is the implementation of the bill itself. Depending on the extent of the legislation, we will need significant instruction for our officers. As we are talking about powers, particularly the execution of powers with children and young people, the legislation will need to be widely understood. That will take significant instruction, which might go beyond the training and information packages that we normally do for legislative change.

I see the bill as being far more complex than, for example, the Hate Crime and Public Order

(Scotland) Bill. That simplifies legislation, whereas the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, as I have mentioned before, can in many ways complicate how a police officer is expected to act and react in any given situation.

Some of the inherent tensions in the bill are about, for example, the recognition of children who are 16 or 17 years of age and have increased maturity and decision making. If we are applying some of the statutory instruments to 16-year-olds, that could create a tension. We need to understand the detail of that and the expectation on policing and on the wider legal system as to how we act. As I have said, when our officers are dealing with a child in any situation, they can be considering five or six different pieces of legislation.

So, the implementation of the bill will have a significant impact. Then, of course, there is the resulting demand. When we are dealing with cases involving children, the surrounding bureaucracy—if I can use that catch-all term—is significantly greater than when we are dealing with adults. We accept that, because we have to deal with and share information with a wider range of partners.

When we are looking at alternatives to prosecution, that brings in and perhaps addresses the question about the third sector, because, again, we have connections with partners when considering referrals and alternatives to prosecution.

The provisions will apply to a wider section of the community, so there could be quite significant resource demands. Then there is systems development. As I have mentioned that before, I will not labour the point.

In summary, the resourcing implications will obviously have a direct impact on the costs. On our reading of the financial memorandum, I do not think that all those aspects are covered at the moment. However, I do not want to be too negative. We are absolutely committed to preparing for the bill, to ensure that the impacts are adequately identified and that we are well prepared for the consequences once it is implemented.

The Deputy Convener: Thank you very much, ACC Ritchie. I call Alistair Hogg.

Alistair Hogg: Can I check whether you can see and hear me?

The Deputy Convener: We can hear you but we cannot see you. Proceed with answering anyway, and hopefully we will have video soon.

Alistair Hogg: On the resource issue, SCRA is probably in a slightly different position because our

business is with children, young people and the most vulnerable in our society. We certainly like to think we are already compliant with UNCRC. However, as I said earlier, we are not complacent enough to think that we are fully compliant—there may be some gaps.

As I have also mentioned, we would like to have tools that would help us with an audit of our current policies, processes, procedures and so on to ensure that we are fully compliant and, if we are not, to understand where the gaps are. If there are any gaps, resources might be required to fill them. Beyond that, we would certainly be looking for access to guidance and, potentially, to training that would be helpful to us.

I think that my video is now back.

11:15

The other area of potential cost lies in the enforcement rights and the ability for challenge to be taken into court. There are also the potential resource implications of meeting that challenge, should a matter get that far. We would hope that, in the vast majority of cases, court proceedings would not be required and that matters would be resolved long before that. We hope that going to court is something that does not happen often.

I mention that issue simply because, if something is of such significance that it leads to court, we know from our experience—we are involved in the courts in our daily work, sometimes to the higher courts and even to the Supreme Court—the costs that are involved in meeting those legal challenges. That is a potential cost, and it is very difficult to assess those at this stage.

I hope that that answers the question.

Mike Burns: In relation to our concern about the potential cost and resourcing, I reinforce Eddie Follan's words.

Again, one of the things that I reflect back is that we have been implementing getting it right for every child since—[Inaudible.]—interagency work and interagency planning. In a Glasgow context, that involves, on my part, 2,000 staff, 10,000 teachers and all the police and health staff.

To pick up the point about implementation, it is not just about training and senior managers like me saying, "We brought somebody in for the day and they were trained on it." It is then about looking at how the training is implemented through your organisation. To pick up some of Alistair Hogg's points, it is also about how you make sure that you are compliant with the legislation and you are promoting it. That needs to be factored into the implementation.

Alison Harris: This is my final question. Are there any areas in which the bill should go further in order to advance the rights of children and young people?

Eddie Follan: I reiterate that we, in local government, are pretty content with the bill other than on the issues that we have raised, which are to do with resources. Notwithstanding what the deputy convener said about pushback, the view is that we should be doing this. However, there are lots of challenges, and local government and public services will have to get to grips with them quite quickly.

We are working closely with the third sector to build capacity. The Children's Parliament has done wonderful work. We will be working alongside it and with Children in Scotland and others.

I do not think that we need to start adding things to the bill. We have also been advised by experts that this is a good piece of legislation as it stands, and we are content with that.

We have a lot to deal with. We have "The Promise" and the findings of the independent care review, and we, in local government, will be working closely with it on those issues.

We think that this is a good bit of legislation that will challenge us as it is. However, if things can be done with the bill that will improve the situation for children and young people, we will certainly look at that and hopefully be able to—[Inaudible.].

Assistant Chief Constable Ritchie: True to form, I will agree with Eddie Follan. The bill as it stands provides a step change for Scotland in the delivery of children's rights, and we are committed to that. I think that it is effective in its intent and in its tenor. There are challenges, which we have outlined, and we understand that.

To take Eddie Follan's point, it is not that we would not seek to add or make suggestions if we felt that that was necessary. I think that it is probably a reflection of the quality of the bill that we do not have anything to suggest or add to it.

Alistair Hogg: I have a similar view. We welcome the bill's current contents. Beyond what has already been contributed to your committee in these evidence sessions and the suggestions of enhancement, particularly in relation to the children's rights scheme and our discussion about whether a commencement date would enhance that, I do not have any suggestions as to how it might be improved.

It is a monumental bill in what it will achieve: incorporating the UNCRC into law is a massive step. I watched with pride the contributions that you heard earlier, particularly those from the guests from other countries, about how the

measure is perceived by the international community. It is commendable and, as it stands, it is a good bill. Some areas in it might be slightly improved on, but I do not think there is any major gap beyond those that have already been highlighted in your evidence sessions.

Mike Burns: I do not have much to add to what Alistair Hogg has said—I concur with him. The issue in and around implementation is the key aspect that I would wholly promote from a practice perspective and from an operational perspective. The devil is in the detail, and it is in the delivery by adults.

The Deputy Convener: That brings us to the end of our questions. I thank the witnesses for taking part in the meeting. As I told the first panel, if you have anything you would like to follow up on, you can do so in writing, and we will publish that on the committee's website.

I suspend the meeting briefly to allow the witnesses to leave, after which we have more business to attend to.

11:23

Meeting suspended.

11:24

On resuming—

Subordinate Legislation

Age of Criminal Responsibility (Scotland) Act 2019 (Independent Review of Disclosure of Information) Regulations 2020 (SSI 2020/305)

The Deputy Convener: The final item of public business is agenda item 2, on subordinate legislation and consideration of a negative Scottish statutory instrument, the Age of Criminal Responsibility (Scotland) Act 2019 (Independent Review of Disclosure of Information) Regulations 2020. I refer members to paper 2, which is a note by the clerks.

As no member has indicated that they wish to comment, are members content not to make any comments to the Parliament on the SSI? As no member objects, that is agreed to.

The next meeting of the committee will take place on Thursday 26 November, when we will continue to hear evidence on the United Nation Convention on the Rights of the Child (Incorporation) (Scotland) Bill.

11:25

Meeting continued in private until 11:31.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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