

## Response ID ANON-BXFT-VMXN-W

Submitted to Consultation on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024: Statutory Guidance on Part 2 and 3, section 18

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### Part 2: Compatibility with the UNCRC requirements, and child rights-respecting practice

1 I have read the draft statutory guidance on Part 2 of the UNCRC Act

Yes

2 Section 3, 'Background and introduction to the UNCRC Act', provides sufficient information on the UNCRC and the background to incorporation.

Strongly agree

Please give us your views:

Through partnership work on the strategic engagement group on the implementation of UNCRC, led by Together (SACR), we have come to the view that the information is clear.

This is supported by our networks, local authorities, in particular, who have routinely expressed the need for background and introduction to balance the needs of youth workers to comprehend the details and allow them to communicate and work in partnership with young people so the information is as accessible and understood as possible.

3 Section 3.4, 'Meaning of UNCRC requirements', clearly articulates what is meant by this in relation to the section 6 duty.

Agree

Please give us your views:

We welcome the clear statement that independent and third-sector organisations may meet the 'public authority' definition. Our youth work leaders are committed to incorporation. They understand their role as part of rights-respecting and rights-promoting practice. However, we would welcome further explanation as to the circumstances in which this may occur – i.e. introductory lines on what constitutes 'delivering functions of a public nature' (s6(6)). This would help us work alongside youth work organisations to allay some fears that there will be onerous pressure on organisations, particularly those in the third sector whose finances and existence are precarious - especially so, with the legacy of COVID-19 and the cost of living crisis creating stress in the system. While we recognise that this is covered more extensively in section 4.3, we support the Together (SACR) and broader membership view that this addition would help to give clarity at an earlier point in the guidance. This would ensure those who may meet this definition are signposted to where further detail can be found in later sections.

We would welcome a reference to section 4 of the Act. Section 4 outlines the different sources that may be considered when interpreting the meaning of the UNCRC requirements, including the preamble to the UNCRC, UN General Comments and concluding observations. Introducing it here would aid clarity while signposting where further detail can be found.

4 Section 4.2, 'Remedies for unlawful acts (sections 7 to 10)' is useful.

Agree

Please give us your views:

It may be more straightforward and better understood to sequence this section as follows:

- (1) Definition of public authority, including functions of public nature (i.e. who needs to follow the law);
- (2) Explanation of the duties (i.e. what these people have to do); and
- (3) Remedies for unlawful acts (i.e. what happens if they don't do what they're supposed to do).

Rights at risk:

The first paragraph notes the challenges many children face in raising legal proceedings. We suggest updating the final sentence to include the framing of children whose "rights are at risk". This would ensure clarity as to the breadth of children who may face such challenges, as well as reflect the language used in non-statutory guidance and the Children's Rights Scheme (s14(3)(b)). We encourage the Scottish Government to amend the sentence to read:

"This is particularly so for children whose rights are at risk, including children with additional needs or those experiencing violence, abuse and trauma."

Audit trail:

We note the Scottish Government's instruction that public authorities should "maintain a robust audit trail about decision-making and service delivery because proceedings may be raised for a relatively considerable period of time after an alleged breach took place" It is essential to ensure that information is gathered and held in a way that is proportionate and does not infringe children's right to privacy (Article 16 UNCRC). We therefore

encourage Scottish Government to amend the final sentence to read:

"It would be advisable to maintain a robust audit trail in relation to decision-making and service delivery in a way that is compatible with the UNCRC requirements."

5 Section 4.3.2 'Definition of a public authority' is clear.

Disagree

Please give us your views:

This section is unduly complex. The structure/ordering requires further consideration to ensure this is clear and supports readers' understanding. Further signposting within the introductory line may be beneficial in setting out what the section will cover.

For example, the section starts by defining "functions of a public nature" before defining a "public authority". This should be re-ordered. There is a concern is that the guidance currently defines "functions of a public nature" without the prior context of why this status is relevant. It may be beneficial to consider changing this order and/or inserting further signposting into the introductory line, for example:

"This section shares the definition of key terms in the Act, to support organisations to determine whether the section 6 duty is applicable to them. The section 6 duty applies to those who meet the definition of a "public authority". Importantly, this definition includes those delivering "functions of a public nature" and so can extend to the private, voluntary and independent sector in certain situations. This section outlines the definitions of these key terms and the application of the section 6 duty to the private, voluntary and independent sector."

Human Rights Act definition of public authority

While the relevant provisions of the Human Rights Act ('HRA') and UNCRC Act share similarities, they must be recognised as separate and distinct. This distinction is not sufficiently clear from the guidance as it currently stands.

As stated in Together (SACR) Stage 2 briefing on the UNCRC Bill, the HRA definition of a public authority is limited and has been interpreted restrictively by the courts. Scottish Government accepted this position and introduced an amendment – now section 6(6) - which sought to overcome the limits of the HRA definition. Section 6(6) makes clear that "functions of a public nature" include those carried out under a contract or other arrangement with a public authority.

While this amendment was welcomed, they remained concerned that there was a risk of creating a "two-tier" system as certain entities providing key services for children are neither contracted out nor funded by the local authority/Scottish Government. This includes private/independent schools, private care homes, private healthcare and private transport providers. At Stage 3, we supported a further amendment – now section 6(7) – that clarifies that public funding, although indicative, is not determinative. Actions which are privately funded may still constitute "functions of a public nature".

Our concern is that opening this section with an overview of HRA caselaw risks clouding the important distinction in the way the two Acts have been drafted.

Consistency of terminology

We note that "Convention" has been used to mean the European Convention on Human Rights (ECHR) in this section while elsewhere it is used to mean the UNCRC. This dual use may give rise to confusion. There is a need for consistency and clarity in how different treaties are referred.

6 Section 4.3.1 'Definition of functions of a public nature' is clear.

Disagree

Please give us your views:

Human Rights Act definition of "functions of a public nature"

The quote given to define "public function" comes from an article on interpreting the HRA. As above, focusing on interpretation of the HRA articles risks confusion as the HRA and UNCRC Act are drafted in different ways. The UNCRC Act was specifically drafted in a way that attempted to overcome the challenges experienced with HRA.

This section of the guidance does not clearly explain sections 6(6), 6(7) or 6(8) which are key to defining what constitutes "functions of a public nature". Instead, discussion of these is left to the subsequent section. The guidance needs to give further explanation that "functions of a public nature" can include actions/inactions by private/third sector organisations under contract or other arrangement with a public authority, such as provision of secure care or school transport. The guidance also needs to be clear that actions/inactions by private/third sector organisations may be covered even if they are not publicly funded – for example non-publicly funded childcare or education. We understand that there are limits as to the level of detail and examples that can be included in statutory guidance – but further information on the content of sections 6(6), (7) and (8) is key to ensuring clarity.

7 Section 4.4, 'Explanation of the duties on public authorities in Part 2, section 6' clearly explains the nature of the section 6 duty on public authorities, including clearly articulating that the section 6 duty applies only when a public authority is carrying out devolved functions conferred under Acts of the Scottish Parliament or common law powers.

Agree

Please give us your views:

We welcome the opening statement that nothing in the guidance should be interpreted as preventing a public authority from acting compatibly in any situation where they are carrying out functions relating to children.

This reflects the Scottish Government's and the youth work sector's commitment to a maximalist approach. It also mirrors that the UNCRC is a "floor" and not a ceiling of rights compliance. It sets minimum standards beyond which duty bearers can and should strive. So, too, does the UNCRC Act set out the legislative "starting point" for rights compliance; however, duty bearers can and should go beyond this insofar as possible.

8 Annexes A.1 – A.5, 'Clarification of conceptual aspects of the UNCRC' are clear.

Disagree

9 Annexes B.1 – B.4 'Sources to guide interpretation' are useful.

Agree

10 Annex C, 'Framework for Reviewing Compatibility (s.6 duty)' is presented in an accessible manner, e.g. the content, style, and length make this a user-friendly and practical resource.

Agree

Please give us your views:

The style and language of this section are clear. We envisage the Framework as a helpful tool to support public authorities in fulfilling their duties.

Interaction with CRIA:

The Compatibility Review Framework will add to the existing tools that public authorities can use to ensure compliance with children's rights – most notably, Child Rights Impact Assessments (CRIA). We would welcome the guidance offering further clarity on the relationship between the Compatibility Review Framework and CRIA. Public authorities must be supported to understand the similarities and distinctions between the two and when they should use a CRIA and when they should follow the Compatibility Review Framework.

Compatibility with the UNCRC

We note that the Compatibility Review Framework begins with an assessment of whether or not the relevant function is within the scope of the UNCRC Act and then considers compatibility with the UNCRC requirements. In line with its commitment to a maximalist approach, the Scottish Government should insert a line encouraging organisations to use the compatibility test widely across their work to provide reassurance that UNCRC obligations are always being met. This would support and operationalise the Scottish Government's expectation that public authorities should act compatibly across all areas of their work, whether or not a specific function falls within or outside the scope of the UNCRC Act. If organisations have satisfied themselves with UNCRC compatibility first, then this reduces the pressure on determining whether or not the relevant function is within scope.

11 I clearly understand how to use the Compatibility Review Framework.

Neither agree nor disagree

Please give us your views:

Please take a look at our earlier comments on the relationship/interaction between CRIA and the Compatibility Review Framework. Public authorities and those youth work leaders making decisions with partners and working alongside young people in the heart of all of Scotland's communities must have clarity on each tool's specific scope, role and purpose and when to use them.

12 Overall, the guidance is presented in an accessible manner, e.g. the content, style, and length make this a user-friendly and practical resource.

Neither agree nor disagree

13 Overall, the guidance supports an improved understanding and ability to fulfil the duties under Part 2 of the Act.

Agree

14 Are there any areas where you think the Part 2 guidance could be improved? Please cite specific parts of the guidance if relevant.

Please give us your views:

The aim and scope of this guidance:

At p5, the document reads: "[t]his guidance aims to provide meaningful support for....any organisation who is or would be a 'public authority' as defined in sections 6(5), (6), (7) and (8) of the Act and those acting under contract or other arrangement" (emphasis added).

As mentioned earlier in our response, there needs to be clarity that those acting "under contract or other arrangement" are public authorities within the meaning of the Act (s6(5)(a)(iii) and s6(6)). The use of "and" creates a risk of confusion around the definition that these contracted bodies are something 'other'. We would suggest replacing "and" with "including" so the sentence reads:

"This guidance aims to provide meaningful support for....any organisation who is or would be a 'public authority' as defined in sections 6(5), (6), (7) and (8) of the Act including those acting under contract or other arrangement" (emphasis added).

Part 3: Reporting duty of listed authorities

15 I have read the draft statutory guidance on Part 3 (section 18) of the UNCRC Act

Yes

16 Section 4, 'Reporting duties of listed authorities' is sufficiently clear on the reporting requirements under Part 3 of the Act.

Agree

Please give us your views:

Introductory section:

We welcome the clarity that the reporting duty is backwards and forwards looking. This will support listed authorities to reflect on what actions they have taken during the current reporting period, reflect on their effectiveness and what steps they intend to take in the subsequent reporting period.

We welcome the statement that listed authorities can explore with children and young people what format would best meet their needs when planning the child-friendly version. While we would ordinarily encourage this to be framed in stronger terms (i.e. "should explore" or "are encouraged to explore"), we understand that there are limits on the wording the Scottish Government can use within statutory guidance.

The direction to existing sources – such as the Promise Data Map and local authority joint strategic needs assessments – is welcome. This should encourage listed authorities to identify and use what information is already available to them, allowing them to identify where there are gaps that need to be addressed.

We welcome the direction that additional evidence may need to be gathered in some areas, "for example, to understand which groups of children are most at risk of not having their rights met". This is key given that some children will not be covered by the bullet point list of considerations set out at p8. For example, protected characteristics under the Equality Act do not include all situations where children's rights are at risk, such as Care Experienced children, children with a parent in prison, young carers and children in armed forces families.

We welcome the clear statement that listed authorities must consider the actions taken by all services in their reports – and not just the actions of children's services.

We welcome the statement that listed authorities may use previously gathered views from children and young people where this information is still relevant. This upholds feedback from children and young people and youth workers (citing jadedness of sector and need to close the "feedback loop" all too often forgotten) that they are frequently asked the same questions even when the relevant 'landscape' has not changed. In line with this statement, we would also recommend that Scottish Government reconsiders the rich and informative views given by children and young people throughout the passage of the 2024 Act when further reviewing the Part 3 guidance. Throughout the passage of the 2024 Act, children and young people presented innovative and creative ideas as to how all levels of government can be more transparent in the implementation of children's rights. They were clear about the need to not only involve children and young in what public authorities report on but also how public authorities report. For example, in relation to preparing UNCRC reports, a member of the Scottish Youth Parliament suggested: "It should be done in the same way as the 'Point, Explain, Example' method in modern studies essays. This will help them be more transparent about their decision-making, including in the consultation stages." (Quote taken from SYP's 2019 UNCRC Consultation Response). We would recommend that Scottish Government revisit children and young people's responses to the 2019 consultation to ensure the views given on the importance of reporting and transparent decision-making are embedded into the Part 3 guidance.

17 Section 5, 'Publication requirements of reports' is sufficiently clear on the publication requirements under Part 3 of the Act.

Agree

Please give us your views:

Further engagement:

We welcome the statement that listed authorities may wish to engage with children and their families in discussions about the findings of children's rights reports once published. The guidance notes that feedback can then be used to inform the next reporting cycle. In this way, the guidance recognises the value of participation as an ongoing process rather than a 'one-off' event, in line with Article 12 and General Comment 12.

18 Section 6, 'Policy intention of children's rights reports under section 18 of the Act', clearly explains how the reporting process contributes to progressing children's rights.

Agree

19 Annexes B.1 – B.4 Frameworks for children's rights reporting are helpful.

Agree

Please give us your views:

We welcome the suggestion of structuring reports around the UNCRC cluster areas. In our view, this suggestion would offer the most comprehensive approach to structuring children's rights reports. This would help youth workers who are often called upon to fill and submit reports to frame the replies to the area where youth work has the most impact. This view is backed up in recent research published by the Observatory on Children's Human Rights which found that use of the cluster approach in public authorities UNCRC reports stemming from the 2014 Act "contribute to effective children's rights reporting". The cluster approach would mirror the approach to UNCRC monitoring at state level, enabling listed authorities to easily refer to issues highlighted in the UN Committee's concluding observations and to consider relevant steps within their remit to address these. In turn, it will also support Scottish Government in producing its contribution to the UK report and separate position statements. We welcome the reflective questions and consider that listed authorities will find these helpful when planning and developing their reports as well as evaluating the effectiveness of steps taken.

20 Annex C, 'Scottish Government use of children's right's reports', is clear.

Agree

21 The guidance is presented in an accessible manner, e.g. the style, length and content are useful in aiding implementation of duties in respect of the Act.

Agree

22 Are there any areas where you think the Part 3 guidance could be improved? Please cite specific parts of the guidance if relevant.

Please give us your views:

Annex E: Glossary of key terms:

There are several places where the UNCRC Act is referred to as "the Bill" and section references are out of date. For example at p36 on the definition of a public authority, it refers to listed authorities being set out "under section 16 of the Bill". This should be Section 19 of the UNCRC Act.

Section 3: Part 3 of the Act

Section 3 refers to child rights and wellbeing impact assessments (CRWIA) and the fact that there is no legal obligation on anyone other than the Scottish Government to conduct these. YouthLink Scotland made this point to Scottish Government colleagues during the early co-production of the paused National Youth Work Strategy e.g while we can support with the completion the obligation lay with Scottish Government. It would be helpful, therefore, for the guidance notes that public authorities may, however, conduct CRWIA at their discretion. As an organisation, regardless of who is "responsible", we will continue to offer support in the creation and development of reports alongside our partners in Government and the broader sector. There is an opportunity for clarity provided going forward.

In this regard, it may be helpful to reflect on our response to Question 10 of the consultation on Part 2 Guidance, which called for greater clarity on the interaction of the UNCRC Compatibility Review Framework with existing tools such as CRIA.

About you

What is your name?

Name:

kevin kane

Are you responding as an individual or an organisation?

Organisation

What is your organisation?

Organisation:

YouthLink Scotland

Further information about your organisation's response

Please add any additional context:

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Do you consent to Scottish Government contacting you again in relation to this consultation exercise?

Yes

What is your email address?

Email:

kkane@youthlink.scot

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## Evaluation

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Matrix 1 - How satisfied were you with this consultation?:

Very satisfied

Please enter comments here.:

Matrix 1 - How would you rate your satisfaction with using this platform (Citizen Space) to respond to this consultation?:

Very satisfied

Please enter comments here.: