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Dear Convener,

I am writing in response to the Equalities and Human Rights Committee Stage 1 Report on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. I would like to thank the Committee for its careful and detailed consideration of the Bill.

I am pleased that the Committee has unanimously agreed to the general principles of the Bill at Stage 1. As has been recognised by so many stakeholders, I believe that the Bill puts in place a very strong framework that will ensure that children's rights are respected, protected and fulfilled in Scotland. I am committed to ensuring that the Bill can deliver the strongest framework possible within the powers of the Parliament. I acknowledge that it is in this spirit that the Committee has made its recommendations.

The Scottish Government's response to each of the Committee's recommendations is set out in the attached Annex. I hope that this response addresses the issues raised in the Committee's Stage 1 Report and is helpful in your further consideration of the Bill. I will continue to give these careful consideration, working with key stakeholders, in advance of Stage 2.

**JOHN SWINNEY**



## United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill Scottish Government response to the Equalities and Human Rights Committee's Stage 1 Report

1. For ease of reference, the Committee's points or recommendations are shown in boxes and numbered in line with the report. The Scottish Government's response is given directly underneath those boxes.

### Support for the Bill

**45. The Committee asks the Scottish Government to set out how it intends to work with stakeholders, including children and young people, to develop the guidance to accompany implementation of the Bill. Also, the Committee asks the Scottish Government for its views on how it will address in guidance the transition from childhood into adulthood.**

2. Response: The Scottish Government have engaged with public authorities, the third sector, children and young people and others through the development of the Bill and has committed to continuing that dialogue through the passage of the Bill in the Parliament, to commencement and implementation.
3. During the public consultation on UNCRC Incorporation, the views of many different children and young people and families were heard from across a range of different sectors, including youth justice, health, social work and education. The Scottish Government funded seven events delivered by partners experienced in working with children and young people. Over 180 children and young people engaged in these events. A summary of the responses from organisations representing the views of children and young people to the public consultation on the Bill can be found here <https://www.gov.scot/publications/uncrc-consultation-analysis-report/pages/5/>.
4. The Scottish Government is committed to continuing to work closely with stakeholders, including children and young people to develop guidance to support implementation of the Bill.
5. Best practice will continue to be followed to support the participation of children and young people in decision-making processes, including by utilising and continuing to review Scottish Government guidance on children and young people's participation in decision-making. The guidance can be accessed here: <https://www.gov.scot/publications/decision-making-children-and-young-peoples-participation/pages/overview/>.
6. The Child Rights and Wellbeing Impact Assessment (CRWIA) which was published on introduction of the Bill will be updated during the passage of the Bill. The CRWIA for the Bill can be accessed here: <https://www.gov.scot/publications/united-nations-convention-rights-child-incorporation-scotland-bill-child-rights-wellbeing-impact-assessment-crwia/>. CRWIA will continue to be used as a tool to engage with children and young people and assess the impact of the implementation programme in line with best practice.

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7. The Scottish Government recognises the importance of good transitions planning in preparing children and young people for adult life, especially disabled children and looked after children making the transition into work, further and higher education and adult services. The Scottish Government will ensure that guidance in support of implementation is consistent with core components of the Getting It Right For Every Child (GIRFEC) practice approach and the national practice model. We will work in partnership with relevant stakeholders to ensure guidance is compliant with current best practice and reflects the lived experiences of children and young people.

## ***Part 1 of the Bill***

### Method of Incorporation

**56. In our human rights report, Getting Rights Right, the Committee emphasises the need to also identify opportunities to advance rights. The Committee therefore recommends the Scottish Government should, in i) its guidance to public authorities on the Bill, ii) any supporting documentation for conducting Child Rights and Wellbeing Impact Assessments and, iii) when preparing and reviewing its Children's Rights Scheme, make it clear that opportunities to advance children's rights should form part of the process.**

8. Response: The Bill represents a step change in the legal protection of children's rights. The Bill will support the advancement and progressive realisation of children's rights. Fully implementing and realising children's rights will, however, require the dedication and commitment of all public authorities and those working with children and young people. The Scottish Government considers that promoting a rights respecting culture within public authorities is essential. Public authorities must be focused on and make the most of opportunities to advance children's rights. The implementation programme in support of the Bill will support progressive realisation of children's rights and make it clear that opportunities to advance children's rights should form part of the process.

### Section 4: Interpretation of the UNCRC requirements

**72. The Committee recommends the Scottish Government amends the Bill so that courts and tribunals 'must', rather than 'may', take into account the whole of the text of the UNCRC and the two optional protocols, when they are determining a case.**

9. Response: The intention behind section 4 of the Bill is to ensure that those sources of interpretation that may be most relevant to the interpretation of the UNCRC requirements are reflected on the face of the Bill. Section 4 of the Bill recognises the indivisibility and interdependence of the rights and obligations in the UNCRC and optional protocols and makes it clear to the courts, rights-holders, public authorities and practitioners that it is important that the UNCRC requirements are considered within the context of the UNCRC and optional protocols in their entirety.
10. On balance, the Scottish Government considers that it is appropriate for the courts to retain discretion in relation to whether any sources should be taken into account in cases which come before them. Parties to a case will be able to plead the relevance of any source to the case and it will be for the courts to then make their determination.

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**73. In addition, the Committee recommends the Scottish Government brings forward amendments at Stage 2, so that courts and tribunals ‘may’ look at a range of other UN materials, as listed: treaty body decisions; other relevant optional protocols (including opinions under the third protocol); general comments, concluding observations, and recommendations (UNCRC and other relevant international treaties); comparative law; and reports resulting from Days of General Discussion**

11. Response: As explained above, the intention behind section 4 of the Bill is to ensure those sources of interpretation which may be most relevant to the interpretation of the UNCRC requirements are reflected on the face of the Bill. The Scottish Government have listened carefully to the evidence that was presented to the Committee and are convinced that expanding the list of sources in section 4(2) is appropriate.

12. As was highlighted in the evidence to the Committee, the role of the UN Committee on the Rights of the Child (“the CRC”), and the various materials which it issues, is to aid state parties and non-state actors in the interpretation and implementation of the UNCRC. The effect of adding these sources to the Bill would be to recognise the central role which the CRC plays and the guiding and interpretive value of those materials which it produces. As with the sources already listed in section 4(2), it will be for the courts to consider whether, and the extent to which, these additional sources are relevant in the circumstances of any case and it will remain the case that they will not be legally binding on the courts.

13. As the Deputy First Minister highlighted in his evidence to the Committee on 3 December 2020, the Scottish Government believes there is a balance to be struck on the degree of specificity in the Bill. In this case that balance is between signposting the most relevant sources to the incorporation of the UNCRC and listing every source which may have a bearing on a court’s deliberation depending of the facts of the case. As such, the Scottish Government does not consider it is necessary to include those sources on the face of the Bill which are not directly derived from the UNCRC, or do not emanate from the CRC, such as comparative law or other international human rights treaties. This will not prevent parties to a case making submissions on these sources and as is normal it will be for the courts to consider the relevance of any sources to the case. The Scottish Government can confirm, therefore, its intention to bring forward an amendment regarding sources which emanate from the CRC.

## ***Part 2 of the Bill***

### Inclusion of the Scottish Parliament as a public authority

**92. The Committee asks the Scottish Government for an update on the officials’ discussions to inform Stage 2.**

14. Response: The Scottish Government is supportive of provision which would seek to bring the Parliament within the framework of the Bill insofar as possible. However, it acknowledges that there are complexities around imposing duties on the Parliament, which is required to act compatibly with the Scotland Act 1998.

15. Scottish Government officials and Parliament officials are continuing their dialogue on matters that need to be considered should amendments seeking to bring the Parliament within the framework of the Bill be lodged. However, it is ultimately for the Parliament to decide in accordance with its own decision-making bodies and procedures how it might give better or further effect to the UNCRC requirements, within its areas of responsibility.

#### A 'hybrid' public authority

**107. The Committee has heard significant evidence that the definition of a public authority, as set out in the Human Rights Act 1998, on which this Bill's provisions are based, is being interpreted by the courts in a way that would be contrary to the spirit and intention of this Bill. We recognise this issue could either be addressed by amending the definition in the Bill or by providing absolute clarity on this point in the guidance issued to public authorities. The latter option, the Committee notes, does not stop the courts from interpreting the definition more narrowly over time.**

**108. The Committee recommends the Scottish Government undertakes a further investigation, with the involvement of the main stakeholders, as to how the definition could be tightened to avoid similar issues arising as those experienced with the Human Rights Act 1998 and provide an update to the Committee in advance of Stage 2 proceedings.**

16. Response: It is intended that the Bill should ensure that compatibility with the UNCRC requirements is required in every instance where public functions are being undertaken. The Scottish Government is confident that section 6 of the Bill, as drafted, would not enable a core public authority to contract out of its obligations under the Bill.

17. Since the appearance of the Deputy First Minister before the Committee on 3 December, Scottish Government officials have engaged with stakeholders such as the Scottish Human Rights Commission, the Commissioner for Children and Young People and Together to explore these issues further. The Scottish Government is sympathetic to the arguments which have been made to the Committee that section 6 of the Human Rights Act (on which the provision in the Bill is modelled) has been interpreted more narrowly by the courts than was perhaps intended. In the context of this Bill, this might have unintended consequences, excluding from the scope of the compatibility duty in section 6 of the Bill functions undertaken pursuant to contracts or other arrangements with public authorities.

18. The Scottish Government is not convinced that statutory guidance in relation to these specific matters would be helpful. As the Committee rightly recognises, guidance cannot alter the law. In order to ensure that the Bill has the intended effect it is the view of the Scottish Government that an amendment is required. An appropriate amendment will therefore be brought forward which would strengthen the protection provided by the Bill in this regard.

19. It is intended that guidance to support public authorities and those undertaking functions of a public nature in fulfilling their duties under the Bill will be provided as part of the implementation plan and this will be developed in partnership with those bodies affected.

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## Legal aid system

**125. The Committee asks the Scottish Government how it intends to take account of the implications of the Bill for legal aid and for this information to be made available to the Committee in advance of Stage 2.**

20. Response: The implications of the Bill for legal aid were considered as part of the Business and Regulatory Impact Assessment, which was published on introduction of the Bill. This can be found here: [United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill: BRIA - gov.scot \(www.gov.scot\)](https://www.gov.scot/bia/2016/06/16/United-Nations-Convention-on-the-Rights-of-the-Child-Incorporation-Scotland-Bill-BRIA).

## Effective remedies

**140. It is not clear to the Committee that Part 2 of the Bill does enough to ensure that the judicial remedies that can be provided by courts and tribunals will be effective in practice. For example, will they focus on what a child or young person might want, or ensure changes in the public authority concerned for the benefit of other rights holders in future.**

**141. The Committee asks the Scottish Government to amend the Bill to ensure the rights holder has a right, under section 8 of the Bill, to an effective remedy. For example, section 8 could be amended to require courts to issue a remedy which is 'just, effective and appropriate'. Furthermore, the Committee asks the Scottish Government to amend the Bill to define what constitutes an effective remedy.**

**142. As part of its consideration of what constitutes an effective remedy, the Committee asks the Scottish Government for its views on the use of structural interdicts to address systemic rights breaches in advance of Stage 2.**

**143. Also, the Committee asks the Scottish Government to amend the Bill to require courts and tribunals to ask for the child's views on what would constitute an effective remedy in their case. The Committee is aware of precedent in other legislation e.g. section 11 of the Children (Scotland) Act 1995 (as amended by the Children (Scotland) Act 2020 (when it comes into force)).**

21. Response: The right to an effective remedy has been described by the CRC as an implied right and it is the policy intention that the Bill should ensure that effective remedies are available for breaches of children's rights. The Bill already puts in place a strong framework which will enable this. The Scottish Government is grateful for the Committee's further consideration of these matters and is broadly supportive of strengthening the Bill in delivering effective remedies for children and young people. The Scottish Government will lodge appropriate amendments at stage 2.

22. What remedy or remedies may be effective in addressing a breach of children's rights will depend on the circumstances of the case and is a matter on which it is proper for the court or tribunal dealing with a particular case to come to a view. As such, the Scottish Government is not convinced that further legislative provision to define what would be an effective remedy would be helpful.

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23. The evidence which the Committee heard on the use of structural interdicts in relation to systemic breaches of human rights was very interesting and we look forward to seeing how this develops as cases come before the courts. The use of structural remedies is being considered by the National Taskforce on Human Rights Leadership and we look forward to their recommendations in the context of the wider human rights framework.

24. Ensuring that the best interests of the child are at the heart of decision-making and that the views of the child are heard are fundamental principles of the UNCRC itself. The Committee's recommendation that the Bill should require courts and tribunals to ask for the child's views on effective remedies is in keeping with the policy intention to ensure that the Bill puts in place the strongest framework possible for the fulfilment of children's rights and we are supportive of this being provided for on the face of the Bill. This would provide for additional transparency and make it clear to children and young people and all practitioners involved in cases under the Bill that the child's views in relation to effective remedies are important and should be heard. It is the Scottish Government's intention to bring forward an amendment to this effect.

#### Who can bring court proceedings?

**155. The Committee understands that the Scottish Government's policy intention is that, in judicial review proceedings on the UNCRC requirements, the test of 'sufficient interest' would determine which individuals and organisations have standing to raise court proceedings. The Committee asks the Scottish Government to provide greater clarity on its policy intention on the face of the Bill. In particular, the Committee asks the Scottish Government to bring forward an amendment at Stage 2, so that section 7 refers explicitly to the test of 'sufficient interest'.**

25. Response: The effect of the Bill is that the ordinary rules on who can bring legal claims will apply to proceedings raising breaches of the UNCRC requirements. In this regard the Bill does not follow the model under the Human Rights Act, which requires a pursuer to be a "victim" of the unlawful act. When the UNCRC requirements are relied upon in judicial review proceedings, the test that will apply is whether the applicant can demonstrate "sufficient interest" in the subject-matter of the application. That test, which is significantly more flexible than the requirement for "victim" status under the Human Rights Act, will apply to UNCRC-based judicial review claims by virtue of section 27B(2)(a) of the Court of Session Act 1988. It is not therefore necessary to repeat that provision in the Bill.

### ***Part 3 of the Bill***

#### Children's Rights Scheme

**180. The Committee asks the Scottish Government to strengthen section 11(3) by amending the wording from 'may' to 'must' in the Bill.**

26. Response: The Scottish Government is happy to accept the Committee's recommendation and will bring forward an amendment to section 11(3) changing the wording from "may" to "must".

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**221. The Committee asks the Scottish Government, in advance of Stage 2, to set out whether the Children’s Rights Scheme will be strengthened to include any of the additional requirements identified by stakeholders as set out above.**

27. Response: The Bill seeks to ensure that there is a proactive culture of everyday accountability for children’s rights across public services in Scotland. The Scheme therefore functions as a transparent mechanism to ensure children’s rights are embedded by Scottish Ministers in practice and will provide a model for public bodies of what arrangements may be required to fulfil their duties in relation to children’s rights. The Scottish Government have listened carefully to the evidence to the Committee on suggested additional requirements for specific inclusion in the Scheme.

28. As the Deputy First Minister highlighted in his evidence the Scottish Government believe there is a balance to be struck to ensure the Bill is workable and focused on leading culture change whilst not becoming too complex or prescriptive so as to ensure that the framework which the Bill puts in place can be flexible and enduring. The list at section 11(3) of the Bill is not intended to list every action which Ministers will take in fulfilment of the compatibility duty in section 6 but is intended to highlight key strategic priorities which should always be included. The list is not exhaustive and it is envisaged that the Scheme will flex and evolve over time in response to the priorities of the day.

29. With these considerations in mind, the Scottish Government is happy to confirm our intention to bring forward an amendment to strengthen the Scheme by requiring Ministers to include arrangements in respect of child friendly complaints mechanisms and ensuring effective access to justice for children and young people.

#### Child Rights and Wellbeing Impact Assessments

**234. The Committee has deliberated over stakeholder concerns regarding Ministerial discretion around carrying out CRWIAs in relation to decisions of a strategic nature. The Committee therefore asks the Scottish Government to remove Ministerial discretion at section 14(3) of the Bill. If this is not removed, then the Scottish Government must provide clear information around what decisions of a strategic nature would and would not be considered appropriate for a CRWIA to be carried out.**

30. Response: Section 14(4) of the Bill requires that the decisions of a strategic nature for which Ministers will prepare a CRWIA under section 14(3) must be set out in the Children’s Rights Scheme. The provisions of the Scheme must be consulted on and this requirement includes consultation with children, the Commissioner for Children and Young People in Scotland and such other persons as Ministers consider appropriate. In practice this means there will be consultation on and transparency about the decisions of a strategic nature on which Ministers undertake CRWIA. The Bill strikes a balance between ensuring greater accountability and transparency for the sorts of strategic decision for which CRWIA is considered appropriate and providing sufficient flexibility to set this out in the Scheme. The annual process by which the Scheme is renewed and republished will provide an opportunity to review the effectiveness of such approaches.

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31. The Scottish Government understands the concerns in raised in evidence regarding the wording in section 14(3). As explained above, the amendment to section 11(3) will mean that arrangements for preparing CRWIAs must be included in the Scheme and section 14(4) requires the Scheme to include a statement in this regard.

#### Mandatory CRWIA duty on all public authorities

**239: The Committee has given very careful consideration to the suggestion to make the duty to carry out CRWIAs mandatory for all public authorities. We know there are already issues with public authorities implementing the Public Sector Equality Duty, this is compounded by a cluttered impact assessment landscape. At this time, we do not therefore consider taking this approach would have the desired impact and may, in fact, be counterproductive by making the process bureaucratic and potentially “tick box”.**

32. Response: The Scottish Government welcomes the Committee’s consideration of this issue and agrees with the Committee’s conclusion.

#### Reporting duty of listed authorities

**243. The Committee recommends the Scottish Government amends section 15(1) to include future actions public authorities have identified for the coming three-year reporting period. The Committee believes this would support the desired culture shift anticipated by the Bill.**

33. Response: The Bill intends to promote a culture of everyday accountability for children’s rights. The reporting obligations which the Bill places on those authorities listed in Section 16. These obligations seek to ensure that, in relation to those authorities whose services most directly affect children and young people, plans and actions in respect of children’s rights are more transparent and accessible. Section 15 places a requirement on those public bodies to prepare and publish reports on what they have done to comply with the duty in section 6(1) of the Bill on a three-yearly basis.

34. Effective planning is central to the delivery of public services and the Scottish Government agrees with the Committee that in addition to this duty, requiring listed public authorities to set out and report on their plans for the next three year period would be helpful in promoting the desired cultural change. The Scottish Government believes that this is how public authorities undertake their functions in any case and that making this clear on the face of the Bill will aid transparency. The Scottish Government is happy to confirm, therefore, that an amendment will be brought forward to this effect.

#### Participation and child-friendly reports

**249. In relation to requiring public authorities to produce child-friendly CRWIAs, the Committee asks the Scottish Government to bring forward an amendment at Stage 2 to give effect to this proposal.**

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35. Response: The Scottish Government believes that undertaking CRWIAs at all levels of government and public administration is an important part of how public authorities demonstrate their compliance and how they respect, protect and fulfil children’s rights in practice. There is a careful balance to be struck between mandatory provision requiring CRWIAs and not over-burdening public bodies. This is why the Bill does not place mandatory duties in relation to CRWIAs on all public authorities. The Scottish Government will continue to work with public authorities to encourage best practise of ensuring their CRWIA processes are accessible, involve consultation with children and young people and are published in child-friendly formats where appropriate.
36. In relation to the duty on Scottish Ministers it is intended that the arrangements for the Scottish Ministers to prepare CRWIAs will be set out in the children’s rights scheme. This will include the circumstances in which it is appropriate for child friendly versions to be published.

#### ***Part 4 of the Bill***

##### Compatibility with UNCRC requirements statement

**261. In principle, the Committee can see merit in extending a statement of compatibility with UNCRC requirements to Member’s Bills and Committee Bills as these are Public Bills. We note, however, the Committee has not had an opportunity to explore what this would mean in practice with the Parliamentary Authorities. The Committee will therefore seek written evidence to inform Stage 2 proceedings.**

37. Response: The Scottish Government notes the Committee’s intention to seek further written evidence from the Parliamentary authorities on this matter. The Scottish Government believe that such an amendment would be a helpful addition to the Bill and would ensure that there is transparency in relation to the consideration of children’s rights in relation to non-government Bills as is required for Government Bills.

##### Power to strike down future legislation

**273. The Committee recognises that the majority view welcomes the power for courts to ‘strike down’ old incompatible legislation (legislation which predates the Bill), or make a declaration that new legislation is incompatible with the UNCRC (legislation which post-dates the Bill). However, we ask the Scottish Government to respond to the points raised by Dr Boyle, Professor Norrie and Professor McHarg and consider whether the Bill’s approach to future legislation could include ‘strike down’ powers while remaining within the competence of the Parliament.**

38. Response: The Scottish Government’s preferred approach would have been to enable the strike down declarator in section 20 of the Bill to be available in relation to all legislation found to be incompatible with the UNCRC requirements. It is incumbent upon the Scottish Government to ensure that any Government Bill is within the legislative competence of the Parliament and it is the view of the Scottish Government that giving the courts power to “strike down” future legislation would be beyond the Parliament’s powers.

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**281. It is concerning to the Committee that there is a significant gap in views around the requirement to report and the obligation to act. The Committee would find it helpful to receive more detailed information on how this duty is intended to meet the threshold of an 'effective remedy' in advance of Stage 2 proceedings.**

39. Response: The Scottish Government believes that there should be accountability and transparency in relation to actions taken as a consequence of strike down declarators and incompatibility declarators made by the courts. Section 23 of the Bill has been included specifically to do this and is an example of how the Bill goes further than the requirements of the Human Rights Act in relation to breaches of the ECHR. This duty is complementary to, and must be read alongside, the substantive compatibility duty in section 6, which will require Ministers not to act incompatibly with the UNCRC requirements.

40. Where a court finds that a provision in legislation is incompatible with the UNCRC requirements, the Scottish Government would consider what action might be appropriate to address the court's conclusions. The effect of section 23 is to ensure that Ministers are required to report to the Parliament on what steps they intend to take in response to a finding of incompatibility to ensure that there is scrutiny and accountability for Ministers' actions following a strike down or incompatibility declarator. The Bill as a whole puts in place a strong framework which will ensure that children and young people have access to effective remedies in relation to any breaches of their rights under the Bill.

**285. The Committee welcomes the Deputy First Minister's commitment to investigate expanding the duty to include a requirement for the report to be produced in a child-friendly way. The Committee would find it helpful to receive an update on the outcome of the Scottish Government's considerations on this matter in advance of Stage 2.**

41. Response: The Scottish Government is happy to confirm that an amendment will be brought forward to require a version of the report which is required under section 23 to be published in a manner which will be understood by children.

## ***Part 7 of the Bill***

### Commencement

**303. The Committee therefore recommends the Scottish Government amends the commencement provision at Stage 2 to ensure the Bill commences 6 months after Royal Assent.**

42. Response: The Scottish Government notes the significant interest in when the appropriate moment for commencement is. It remains the Scottish Government's intention that the Bill should be commenced as quickly as possible. As the Deputy First Minister made clear to the Committee, the Scottish Government is keen to avoid an extended pre-commencement period. Readiness for commencement of the Bill

should be a priority for all public authorities in Scotland. The Scottish Government will continue to give this matter consideration in advance of Stage 2.

### Costs and demand

**317. Some concerns have been raised with the Committee about resourcing to implement the Bill. However, in the absence of any costed evidence from stakeholders on any additional resource needed, the Committee does not wish to make recommendations at this time. We encourage stakeholders to keep working with the Scottish Government and the Committee will monitor whether resources become a barrier to the Bill's implementation.**

43. Response: The Bill will support the creation of a proactive culture of everyday accountability for children's rights. Fully delivering on that ambition is about making sure that the culture of public authorities operates appropriately to protect children's rights at all levels. This is more about the outlook and perspective of organisations than it is about the amount of money that is spent.
44. For economic, social and cultural rights, article 4 of the UNCRC makes clear the requirement to undertake measures of implementation to the maximum extent of available resources. A number of stakeholders gave evidence to the Committee highlighting that there are opportunities for more effective use of existing resources, including sharing best practice, to ensure children's rights are further embedded in public services.
45. The financial memorandum sets out the funding that will support the implementation programme. The Scottish Government will continue to engage with public authorities, the third sector, children and young people and others through the passage of the Bill, through to commencement and implementation.

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