OFFICIAL REPORT
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Equalities and Human Rights Committee

Thursday 12 November 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

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CONTENTS

EQUALITIES AND HUMAN RIGHTS COMMITTEE
23rd 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:

Dr Katie Boyle (University of Stirling)
Morag Driscoll (Law Society of Scotland)
Professor Aileen McHarg (Durham University)
Professor Kenneth Norrie (University of Strathclyde)
Janys Scott QC (Faculty of Advocates)
Andy Sirel (JustRight Scotland)
Professor Elaine Sutherland (University of Stirling)
Professor Kay Tisdall (University of Edinburgh)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

Virtual Meeting

Scottish Parliament

Equalities and Human Rights Committee

Thursday 12 November 2020

[The Convener opened the meeting at 08:30]

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

The Convener (Ruth Maguire): Good morning and welcome to the 23rd meeting in 2020 of the Equalities and Human Rights Committee. The first item of business is our first evidence session on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, and we will hear from two panels of witnesses. I am grateful to all the witnesses for their attendance.

I welcome our first panel of witnesses, who are Dr Katie Boyle, associate professor of international human rights law at the University of Stirling; Professor Aileen McHarg, professor of public law and human rights at Durham University; Professor Kenneth Norrie from the University of Strathclyde's law school; and Professor Elaine E Sutherland, professor of child and family law at the University of Stirling. Thank you for joining us.

I remind members that, if their question is addressed to a specific witness, they must identify the witness by name; otherwise, we will work to the order in which witnesses appear on the agenda. If witnesses feel that they have nothing to add in response to a question, they should not feel that they have to comment—please simply say that.

We have a lot to get through and a limited amount of time. I appreciate that we are working with this wonderful technology and that the bill includes technical details, but I encourage members and witnesses to keep questions and answers succinct to allow us to get through as much as possible. Please allow a few seconds for broadcasting staff to operate your microphone before you begin to ask a question or provide an answer.

There is strong support for direct incorporation of the UNCRC into Scots law. What are your views on that approach? What are its potential benefits or disadvantages?

Dr Katie Boyle (University of Stirling): Thank you for the opportunity to speak about the issue. On the benefits of the bill, it is almost self-evident that, if better rights protection for children is introduced, children will have better access to their rights. What is particularly innovative about the approach is that it uses existing public law remedies, so we are already familiar with the framework and the way in which it protects those rights under the European convention of human rights. There are also innovative mechanisms to ensure that, if something goes wrong, children will have access to a remedy. It is particularly welcome that, if all else fails, there is a remedy in the court—that is a key and important aspect of incorporation.

The way in which the bill operates is that it will embed rights compliance in the work of the legislature, to a degree, and to a greater degree in the work of the Government and public authorities. It will also offer the court a role in protecting rights. That model of incorporation will embed rights compliance across those roles of the state.

Where there is scope to go a little further is in enhancing the Parliament's role and ensuring that public authorities understand their duties and fulfil their positive obligations, and that the role of the court is clear on what it can do to meet the threshold of an effective remedy. We must also ensure that there is human rights accountability for children if public services are privatised.

The Convener: Professor McHarg, I understand that you have been having difficulties with the technology. Is it okay for me to bring you in now?

Professor Aileen McHarg (Durham University): I think so, convener.

I do not have a strong view on the desirability or otherwise of incorporating the convention. The bill is interesting from the point of view of domestic protection of fundamental rights. As Dr Boyle said, in a number of ways, it goes beyond existing models in both the Human Rights Act 1998 and the Scotland Act 1998—[*Inaudible*.]

The Convener: Professor McHarg, the sound seemed a bit fuzzy there. I think that we are losing your connection. If you do not mind, I will move on to the next witness and we will come back to you.

Professor Norrie, will you comment on the potential benefits and disadvantages of the bill's approach?

Professor Kenneth Norrie (University of Strathclyde): Good morning, everyone. The advantages of making children's rights absolutely central to policy making and law making in the way that public authorities operate are self-evident. The question is whether the bill's approach is the right way to go about that.

I should prefer a different approach. For a whole host of reasons, I am not particularly keen on the

structure of the United Nations Convention on the Rights of the Child. One simple reason is that it is worded very much not in terms of rights; primarily, it imposes duties on state signatories to the convention, which of course we might interpret as giving rights. However, to me, good law is accessible law. Particularly when we are dealing with children and their rights, if we want to be able to say that they have rights to do X, Y and Z, they have to know about it. For them to read that the state has an obligation to protect X, Y and Z does not help.

I should much have preferred for the bill to have gone through every one of the substantive rights in the UN convention and converted them into rights. I will give a simple example. One of the convention's provisions says that state parties have to set a minimum age of criminal responsibility. In Scotland, we have done so very recently—or, at any rate, we increased the minimum age here. It would have been the easiest thing in the world to have said that children below a certain age have a right to have their behaviour dealt with in a welfare-based system rather than by the general courts. That is just one example of what I should have preferred the bill's approach to do.

My other major problem with the UN convention is a fear that, once it is incorporated, we will think that children's rights have been sorted and we do not need to go any further. We must remember that the UN convention sets minimum standards. A lot of rights are completely ignored in it, partly due to its history as a worldwide convention that tries to encourage every member state on the planet to buy into such rights.

Two very obvious things are missing from the convention. The right of a child to his or her evolving sexuality or gender identity does not appear; nor does a right not to be forced into marriage. There are all sorts of other things, such that, if we had started afresh and decided what rights were appropriate for children in Scotland in 2020, I think that we would have come up with a very different list.

The Convener: Thank you—that is very interesting. We will go back to Professor McHarg, who is back with us.

Professor McHarg: The point that I wanted to make is similar to Professor Norrie's. The key way in which the bill's approach differs from that in, say, the Human Rights Act 1998 is that, for the UN convention, there is no body of authoritative interpretation that the Scottish courts are instructed to take into account. That gives them a wide degree of interpretative freedom. The impact that that would have in practice would depend very much on what the courts do or do not do with it. As Professor Norrie said, if the convention is structured around duties rather than rights, the bill might have less impact than is anticipated.

The Convener: I will bring in Professor Sutherland now.

Professor Elaine Sutherland (University of Stirling): Thank you for giving me the opportunity to participate in the discussion. I endorse everything that Dr Boyle said. She summarised beautifully the many benefits of the convention and of incorporation.

I take the point that the convention, like any instrument, has the characteristics of its time. Professor Norrie is quite right that the convention does not address squarely issues of gender identity, but there is a lot of other material from the United Nations Committee on the Rights of the Child that elaborates on rights in the convention—[*Inaudible*.]—for example, and a number of others that allow for protection of those things. We therefore part company there, because it would be unlikely, even if we passed our own statute now, to cover—[*Inaudible*.]—that we might want to respect for children in the future. An important thing to remember is that there is a living element to the convention, which comes about in a number of ways.

I will take the opportunity to clear up something that leads to misunderstanding about the convention. There are occasions when Scots law already—[*Inaudible*.]—the convention, and one of the most obvious examples is that, although the best interests of the child are simply a primary consideration in the convention, the welfare of the child is generally the paramount consideration under Scots law. It is sometimes suggested in discussions about the convention that that means that incorporating the convention will reduce children's rights. I want to make it absolutely clear, in case committee members are not aware of this, that the UN convention makes it clear that, where domestic law gives a child more rights, the convention does not in any way diminish those. I wanted to clarify that, because that misunderstanding floats about.

I also want to make the point that, although there is no court on the rights of the child that is equivalent to the European Court of Human Rights, so we do not have that kind of authoritative statement about interpretation, there are many other tools in the toolbox for interpretation. [*Inaudible*.]—the general comments and the concluding observations of the UN committee, and there is the protocol 3 opinion of the UN committee under that, which deals with individual cases.

We were asked to keep our answers brief. If you would like me to expand on what I mean by those other resources from the UN committee, I will be

happy to do so, but I do not want to run over my time.

The Convener: We will have opportunities to probe matters further as we move through the evidence session. Those were helpful clarifications. We are having a bit of a problem with the sound and picture dropping out, but we are getting what you are saying. If it persists, we might turn off your video so that we can hear you loud and clear, as your words are the most important thing.

We move on to questions from committee members, starting with Mary Fee.

Mary Fee (West Scotland) (Lab): I want to explore sections 4 and 6 of the bill with the witnesses. Should the interpretation of the UNCRC, which is set out in section 4, be expanded to take account of the general comments and concluding observations of the UN Committee on the Rights of the Child or any other international human rights opinions or treaties? If so, might there be any unintended consequences of doing that?

08:45

The second area that I want to explore is the definition of a public authority, which is laid out in section 6. Concerns have been raised about that. For example, we have heard that children's hearings and other agencies will not automatically be defined as public authorities, which could bring problems and issues. Should the definition be expanded to bring every organisation under the umbrella or scope of being a public authority?

There is a second issue relating to public authorities. Is the bill clear enough about what a public authority should do if it is faced with secondary legislation that is enforced, but is incompatible with the UNCRC requirements?

I am sorry to ask so many questions, but in the interest of time I wanted to get through as much as I could.

Dr Boyle: I am glad that you asked the question about section 4, which my colleagues have already picked up on. I recommend that the interpretation clause be amended. Professor Norrie highlighted that, without clear instructions about what rights mean in practice, it is very hard for duty bearers, the judiciary—when it is interpreting rights—and, primarily, children to know what they mean.

There are different models of incorporation and different ways in which that can be achieved. One is the direct incorporation of the treaty, which is what the bill seeks to do. A way to address what is called the indeterminacy critique—the idea that some rights in international law are too vague—is that we need to be able to have regard to all the different instruments that help to explain the substance and content of rights.

This is not the first time that the issue has been tackled. For example, rights in the South African constitution, which include economic, social, cultural, environmental and children's rights, are interpreted such that courts must have regard to international law and may have regard to comparative law in order to help them. Although the UNCRC Committee is not technically a court, it takes on a quasi-judicial function and, as Professor Sutherland highlighted, there is a body of jurisprudence under the optional protocol to the convention.

That is not to suggest that other international human rights law, such as other UN treaties, should not be included in the interpretation clause, because I think that they should. We need to have reference to other bodies in order to fully understand how the UNCRC has been developed and interpreted over time, particularly in relation to children's economic and social rights. I recommend that the interpretation clause be expanded to include treaty body decisions, optional protocols, general comments, recommendations and comparative law.

In relation to unintended consequences, there might be a fear that that would make all those decisions binding, but that is not what an interpretation clause does. It asks the interpreter to have regard to the other instruments in order to help them to understand the meaning of the rights. Ultimately, they can weigh up the different instruments and types of interpretation and then give meaning and substance within the context of Scotland. There is a margin of appreciation of how rights are interpreted domestically—that is how international human rights law works. The more help that is given to the interpreter, whether that is the duty bearer, the child or the court, the easier it will be. I say without any hesitation that it is necessary that there be a more expansive interpretation clause in order for the bill to work.

On the public authority question, the major concern for me is that the model that is employed mirrors that in section 6 of the Human Rights Act 1998. Although that might have been the most helpful way of trying to capture the acts of private authorities that performed public functions at the time, the way in which that has been interpreted by the courts has proved to be extremely unhelpful in knowing who is responsible for what, at any time, when public services have been privatised.

For me, the major concern is that, when children interact with any form of public service that has been outsourced to a private body, they may ultimately not have the human rights protection that they deserve. Different means are available to

address that—for example, we might use the more expansive definition that has been developed in case law.

I will not go through the full history of all the cases, but if you look at the case law, from YL v Birmingham City Council to the Ali v Serco Ltd case in Scotland, you will see that the motivation of the private provider currently supersedes the protection of the rights holder—in this case, the children. That needs to be flipped so that the children's rights supersede the motivation of the private provider. There may be different ways to achieve that aim. If that is what the bill seeks to do, the provision in question needs to be revisited, because the case law does not provide a helpful or stable basis in respect of private functions.

I have spoken at some length. I did not quite catch the end of the first part of Mary Fee's question. I am happy to come back to that, but I am aware that colleagues will want to comment, so I will defer to them.

Professor McHarg: I agree with what Dr Boyle said. The definition of "public authority" in section 6 is, as Dr Boyle said, based on the Human Rights Act 1998, so I do not think that there is any concern that children's hearings will not be included in its scope. As far as I am aware, children's hearings are regarded as a public authority for the purposes of the 1998 act, so that is not an issue.

However, as Dr Boyle said, it is the definition—[*Inaudible*.]—and it is worth looking at the Victorian Charter of Human Rights and Responsibilities Act 2006, in Australia—[*Inaudible*.]

The Convener: I am sorry, Ms McHarg, but your sound totally dropped there. I ask broadcasting to cut the visuals, and I ask you to start your answer again so that we can hear you clearly.

Professor McHarg: On the definition of "public authority" in section 6, I agree with Dr Boyle that there is real concern around how that will apply to private providers that carry out functions on behalf of the state. For a model, it is worth looking at the Victorian Charter of Human Rights in Australia, which was drafted with the problems of the Human Rights Act 1998 in mind and makes it much more explicit that contracted-out providers are to be included in the scope of the legislation. In order to prevent the bill from being interpreted in the same way as the 1998 act, the drafting needs to change.

Professor Norrie: My answer to all the questions from Mary Fee is to ask members to remind themselves of what the bill is designed to do. It is not just about giving rights that are enforceable in a court of law. It is also about changing hearts and minds, and the way in which all of us in society, including private authorities and courts, parents and teachers—whoever is making decisions, and policy decisions in particular—to keep children at the heart of their consideration. I am not saying that children's rights have the edge, but they should be at the heart of consideration.

If that is correct, it follows that we need as broad a range of sources as possible to help us to interpret the specific provisions. We also need as broad an interpretation as possible of what constitutes public authorities, or bodies that carry out public functions, in order to achieve a real change in the way that we, as a society, deal with children.

I hope that the committee picked up the important point that Aileen McHarg made about children's hearings, which Mary Fee mentioned. There is no question but that a children's hearing is a public authority. Section 6(3)(a)(ii) states that "a court or tribunal" is a "public authority", and there is no question but that a children's hearing is a tribunal. That is clearly in the bill as it stands.

Professor Sutherland: One thing about being the last to answer is that I am going to use the word "endorse" quite a lot. I echo what Dr Boyle and the other speakers have said, and I think that we are all on the same page in saying that the more tools there are in the toolbox of interpretation, the better.

The person who is doing the interpreting has discretion about what they use and how much they rely on those things, although that is not always true of certain higher court decisions. Generally speaking, however, they will look more broadly at human rights sources, and on this matter they will look particularly at the work of the United Nations Committee on the Rights of the Child and some other human rights bodies. It is very important that the court has that in its mind when it is interpreting rights under the convention. As far as section 4 goes, that is definitely important.

There is one wee technical point that I do not think has been picked up. Under section 4, the sources that the court is referred to are the convention and the first two optional protocols, which have been ratified by the United Kingdom. The wording is that the court "may" take those things into account. I would be inclined to turn that into a "must" or "shall". That is an important distinction, because it would seem odd, when looking at convention rights, not to look at the convention and, where relevant, the optional protocols.

That is all that I have to say on section 4 except that we should keep the range of sources used in interpretation as broad as possible.

On section 6, I again endorse everything that has been said about where public services have

been outsourced to private providers. I agree with the other witnesses that the law has not necessarily ended up where we thought it would. It is very murky and unsatisfactory, and therefore we definitely need to look again at the issue of private providers of public services.

One other point that I would raise is to suggest adding the Scottish Parliament to the list of bodies. That would seem to me to be a beneficial addition, instead of there just being the Scottish ministers and courts or tribunals.

The Convener: Mary Fee, do you wish to come back in?

Mary Fee: The only question that I still have—perhaps the witnesses did not cover this because my initial question was so long—is on what a public authority should do if it is faced with secondary legislation that is in force but appears to be incompatible with the UNCRC requirements. Perhaps the witnesses can briefly touch on that.

The Convener: Katie Boyle, can we come to you?

Dr Boyle: I will defer to my public law colleague, Professor McHarg, on that question. There is an ability to interpret in so far as is possible.

Professor McHarg: There is an interesting difference between section 6 of the bill and the Human Rights Act 1998. The 1998 act gives public authorities a defence if they had no choice but to act in the way they did because of legislation that was in force. There is no such defence in the bill. In that respect, it is modelled on the Scotland Act 1998, rather than the Human Rights Act 1998. That creates an interesting potential anomaly, whereby the Parliament retains the power to legislate contrary to the convention in the future, but ministers do not have the power to act contrary to it. It would be worth while resolving that conflict.

09:00

Professor Norrie: Aileen McHarg has given the public law perspective but, from the private law perspective, it seems to me that a public authority has to follow what the law says; it has to follow its duties under primary and secondary legislation. It is not for the public authority to make a decision that legislation is inconsistent with the UNCRC—that is a matter for the courts. I should have thought that a public authority's safest action would be to follow the law until such time as it was told that that law was inconsistent.

Fulton MacGregor (Coatbridge and Chryston) (SNP): As we know, part 2 of the bill, rather than requiring the creation of a new body, envisages that existing courts and tribunals will authorise the judicial remedies that are proposed in the bill. Do you think that those existing courts and tribunals are accessible to children and young people? If not, what improvements would be required there or with the bill more generally?

Dr Boyle: The way that the remedies are set out in the bill is what I would call a high-level skeletal framework, which deals with what the court can do with problematic legislation. Under section 20, it can retrospectively strike down legislation that is incompatible and, under section 20(5), it has the power to suspend the effect of those strike-down powers. It can also issue a declaration of incompatibility if, for example, legislation that is incompatible is passed after the bill and it is not possible to interpret it so that it is a compatible subsequent piece of legislation. That is all about dealing with legislation.

Under section 8, courts and tribunals can issue remedies that they deem to be "just and appropriate". For me, there is an emerging gap relating to how to deal with what would be deemed to be effective remedies under international human rights law. The UNCRC and the UN committee demand that, if we are to incorporate the treaty, we need to make redress available for unlawful acts. The legislative provisions should cover not only the unlawful acts but what happens if the decision maker does not comply with the legislation before it in a UNCRC compliant way. It is about how children access effective remedies when something goes wrong, and not just in relation to those big skeletal acts.

Two things need to be further fleshed out in the bill. The first is that we need to introduce a child-friendly complaints administrative system. The idea is that, if something goes wrong, the first port of call should never be the court. We should first exhaust other administrative mechanisms, which must be sensitive to children's needs. A review is needed of how that operates in practice, because, as we see from the witnesses today, those rights cut across all different areas of law. It is not just a family law, immigration or education issue; it is about the provision of rights to children across different fields. We need to look at whether the administrative complaints system is child friendly and, again, the UNCRC implicitly requires that system of redress.

Ultimately, and in order for the UNCRC incorporation to work, people also need access through the court to an effective remedy for violations. There must always be a court there as a means of last resort. We are familiar with the idea in section 8 of courts issuing remedies that they deem to be "just and appropriate". That works in practice in other respects. The courts must consider many different factors and strike a balance in considering what is just and appropriate.

Courts might sometimes be quite deferential in their remedies, which is perfectly okay. The court has a whole list of remedies that it can use. In some instances of UNCRC violation, the court might have to be more interventionist to help children to access a prompt and effective remedy that deals with the issue at hand. Using damages alone will not suffice to meet children's needs. I recommend either that the bill should include the right to an effective remedy, or that the courts should have to strike the balance of ensuring that remedies are just, effective and appropriate.

Fulton MacGregor: Dr Boyle has helpfully pre-empted my second question. Will the other witnesses, as well as answering the initial question, also go on, as Dr Boyle did, to tell us about the remedies that courts and tribunals could provide, and about how effective those might be in practice for children and young people?

Professor McHarg: The remedies in the bill are largely modelled on those in the Human Rights Act 1998, but there are a couple of important differences.

One difference is in the time limits. Those have appropriately been extended so that the time does not start running out until a child reaches the age of 18.

The other important difference in enforcement is in the role of the Children and Young People's Commissioner Scotland, who has the ability to intervene in proceedings and to bring those proceedings without relying on a child to do so. That is a huge improvement in enforceability.

With regard to the legislation, the courts are public authorities and so must exercise their powers in a way that is compatible with the convention. That might require them to take steps to improve or change their procedures or to improve accessibility.

In a more general sense, accessibility comes from the availability of finance. It is also a question of people's knowledge of their rights and obligations. Something that is missing from the bill—although it is in the Welsh legislation to incorporate the convention—is the duty to publicise the rights that children and young people have under the convention. It might be worth thinking about adding that educative duty to the bill.

Professor Norrie: I want to pick up on Aileen McHarg's point about the Children and Young People's Commissioner Scotland. That office is essential to the effective implementation of the legislation. There must be a massive and increased investment in funding for the commissioner's office so that the commissioner can operate effectively for all children and to ensure that the commissioner has the capacity to intervene when appropriate.

The commissioner is central for another reason. One of my fears about any concept of children's rights is its vulnerability to hijack. Very often, children's rights are hijacked to serve adult interests, and debates that go to the court, which are structured as if they were a children's rights issue, are actually nothing to do with the child—they involve adults arguing it out. I will give two examples of that.

A couple of years ago, there was a really interesting case in England in which a child sought a declaration under the Human Rights Act 1998. The child argued that the rule that a sperm donor is not in law the father of the child, which also applies in Scotland, was an infringement of the child's right to family life. There is an interesting argument to be had about where genetics fits in to how we define parents, and that is how the court dealt with it. That child was three years of age. I said that the child was arguing in court but, of course, the child was not arguing in court; what was really happening was that the adults were exploring an issue for adults.

Another example is from Hungary, which is currently debating an amendment to its constitution to give children the right to live in the gender identity into which they were born. Just think about that for a moment. It is nothing to do with the rights of the child always to retain the gender identity into which they were born; it is about the adults saying, "Let's not have anything to do with gender recognition, gender reassignment or anything like that."

My fear is that children's rights issues will be hijacked. The role of the Children and Young People's Commissioner Scotland is a crucial protection in that regard, so I would very much enhance that role. There are powers in the bill to intervene, but I would like them to be much stronger.

Professor Sutherland: I will backtrack to where I think Mr MacGregor's question began. If I understood it properly, it was about how accessible the legal process is to children.

The bottom line is that the legal system is designed by adults for adults. In fact, it is intimidating to a lot of adults, so how much more so must it be to a child?

From the child's perspective, our problem begins with the fact that many children do not know that they have rights. If they have any concept of rights, they probably do not know much about them, and they do not know what they are. That goes right back to our not educating in schools about children's rights.

It is a constant frustration to me that children's rights are not addressed as a compulsory aspect of the curriculum in all schools from an early age. Why that does not happen is a bit of a mystery to me. The United Nations Committee on the Rights of the Child has lots of resources on its website and elsewhere to help design courses that would enable children to explore children's rights. Those can be used in educating children from a very young age through to more sophisticated education for teenagers. In Scotland, we need to make that a mandatory part of the curriculum so that children grow up learning that they have rights and incrementally learning more and more about them.

On embedding all those things into the whole of Scottish society, the bill and the act that I hope it will become should be accompanied by public education on children's rights, because it is more than apparent that many adults in Scotland are not getting it, either. On education, the first step to children having any hope of using the legal system is for them to know that they have rights and to understand what their rights are. Along with that goes the education of the adult community, and not just of the professionals, such as school teachers and social workers who discharge particular functions, although they should be included in education that is perhaps tailored to those functions. Education of the whole community on children's rights is important, because it will be an essential part of the puzzle to make it all coherent.

09:15

It is absolutely essential that there is a legal remedy. Being able to go to court is the big step that makes those who are under duties to do certain things remember that they have to do them. That remedy has to be there in the background, although it should be a last resort. Instead of that, we need child-friendly complaints procedures in all the places where we find children—wherever children are, there should be a child-friendly complaints procedure. Children should not be even thinking of going to court, because it should not get to that point.

Advocacy services are another crucial part of the puzzle. Someone should be there to help a child to pursue their rights. Many parents do that on behalf of children, but we have to remember that the parent is sometimes the source of the problem, so it cannot all be left to parents. There are also children who do not live with their parents. Where the state takes on the caring obligation, whether through foster or residential care, the child must have the opportunity to raise issues if their rights are not being respected. In all those places, we need complaints procedures, and the child needs to know that there is someone independent of the organisation who can help.

Professor Norrie highlighted the important role of the children's commissioner in that respect, which I completely endorse—there I go with that word "endorse" again—but there must be other people in a position to do that, too. It cannot all be left to the commissioner. We must consider developing a child advocacy service. One is just starting up in respect of the children's hearings system, which is perhaps a model that could be taken further.

It is important to clarify in the legislation who can bring actions, which might not simply be actions in respect of a single child; it might be actions in respect of groups of children, or a class action approach.

There is a big role for adults in helping children to pursue their rights, which we cannot leave to children alone. A crucial part of that is ensuring that children know that they have rights and know a bit about what they are.

The Convener: Katie Boyle wants to come back in, but, before she does, I say that I endorse what you say about education but it would be remiss of me not to mention the many children and young people who the committee has met through its outreach work who are very switched on to their rights and are learning about their rights in innovative ways. We have had contact with the Children's Parliament, the Licketyspit theatre company, Who Cares? Scotland and Aberlour. There is lots of good work going on out there. I endorse your point, but I want to acknowledge the children and young people and their supporters who are already doing that work.

Dr Boyle: I want to pick up on Professor Sutherland's point about systemic issues and the effectiveness of the current mechanisms that are used. The court already has the power to grant different types of remedies. It can compel things to be done , it can stop things from happening and it can quash decisions. There is the opportunity through the bill for the court to award damages.

What is typical of human rights cases is that the remedy tends to be compensation. That is not a bad thing, as it can help with an effective remedy. However, some of the rights—in relation to the treaty and to international human rights law more broadly—that would be incorporated through the bill would require the court to adapt to new ways of dealing with systemic issues.

I often use the example of the Napier v the Scottish ministers case, which was about prisoners slopping out in prisons. When the case came before the court, the court found that that was a violation of article 3 of the European convention on human rights. The court responded

to that by issuing damages to the lead case, and all the others behind that case could seek damages, too. That was a systemic issue; there was a systemic problem in the prisons and, rather than issuing an order for prison authorities to fix the problem, the court responded to it—in a way that was quite right within its sphere of competence—by issuing damages as a way of encouraging the Government to change its behaviour.

Under international human rights law, when systemic issues arise in relation to economic and social rights, for example, you often find that the issue is of a collective nature and it is not appropriate to rely on the individual rights-based model of one person bringing the case and other cases being sisted behind it or on the new Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, which looks at the individual rather than the collective systemic issue. Therefore there is a lot more work to be done on how to issue structural orders. The national task force on human rights leadership, which I also advise, is looking at that. It is about considering how to respond legally to systemic issues when they arise. For example, in other countries where there are such adjudications, a court might in some way group together cases in which there is a systemic issue and issue a structural order, which may include asking different parts of Government authorities, public authorities and possibly private authorities that perform public functions to do different things to fix the original violation. That is a new way of looking at such issues that deals with the original problem rather than relying on compensation to encourage better compliance. That is something to think about for how we approach the issue and, of course, it would require an adaptation in how the judiciary operate.

Theory and practice tell us that it is better to help the judiciary by explaining what is expected of them in a bill, so the more clarity and the more instructions you can give to help them in their duties, the better. Perhaps there is room to refocus on what it means to be effective and ask what the threshold is for an effective remedy, and there is case law on that. The courts were used to doing that under European Union law, but we have now lost the right to an effective remedy under EU law as a result of Brexit. We have the right to an effective remedy under the ECHR but, again, that was not incorporated as part of the Human Rights Act 1998, so there is a gap in provision there. The UNCRC bill presents an opportunity to address that gap for children.

Gillian Martin (Aberdeenshire East) (SNP): I have a couple of questions that I will run together, in the interests of time, on who can bring court proceedings and the time limit on them, as set out in the bill. We have already discussed the Children and Young People's Commissioner Scotland having the right to bring court proceedings. Section 7 of the bill says that an individual or organisation can raise court proceedings in respect of an alleged breach of the duty on public authorities. For judicial review actions, an individual or organisation would also require to demonstrate sufficient interest to be able to bring proceedings. Are you happy with that overall approach, what is your interpretation of what that would mean and how do you assess that? I would also like to hear your views on whether it is correct to exclude the period when a young person is under 18 for calculating the time limit for raising court proceedings under section 7. In our submissions we have had some mixed views on that, so I am interested to know what the witnesses think.

Professor Norrie: I will first take the point about excluding counting the time before the child has reached the age of 18. I think that the bill has to have that. It is a question of limitation and—[*Inaudible*.]—proceedings if some wrong has been done to a person, and it is entirely appropriate that we do not count time during which a child or young person is under a particular age. This goes back to Professor Sutherland's point about education, in that children tend not to know what their rights are. They often do not understand that a wrong has been done to them until they are older and more mature. It would be very wrong to have the same period for a wrong done to a six-year-old as a wrong done to an adult. The reason for that is obvious. Therefore, I endorse the provision as it stands.

It generally fits into the legal system as a whole that you have to be personally affected by an issue before you can raise that matter in court. There need to be exceptions to that, and again I come back to the Children and Young People's Commissioner Scotland. We should not need to wait until harm is done if a body such as the commissioner has identified a rule of law that has potential to do harm. Therefore, I would make exceptions but think that the general principle that a person has to be personally affected is good.

Professor Sutherland: In response to the question about age, absolutely. To pick up on my response to an earlier question, I would say that there are still issues about children knowing what their rights are. There is a big issue with non-lawyers not identifying problems as legal problems. Very often, people identify when something rotten has happened to them, but they might not identify it as a legal problem

There are also obstacles in that, even if a child knew that some legal wrong had been done, they would have to find the right kind of solicitor to take the case and navigate through the legal system.

Meanwhile, the clock would be running if we did not have the provision that disregards the period of time prior to the child being 18. Therefore, I am 100 per cent behind the provision.

The objection that I have seen raised is that it will delay legal proceedings. We are all well aware that delays in legal proceedings involving children can be very harmful to the child. There are numerous occasions on which the court has raised that point. Indeed, the Children (Scotland) Act 2020 highlighted that delays in dealing with cases involving children are generally a bad thing and that courts should be aware of that.

However, all that this provision does is give a child a benefit; it does not prevent the child from bringing the case as soon as he or she is aware that it is a possibility. The child can bring the case before the age of 18; it is only that the general time limit of one year to raise a case will not apply to children until they reach the age of 18. Therefore, I am very happy with that provision and do not see the danger. I do not see why it would delay cases, although in the later part of this morning's meeting, I think that you will hear from at least one speaker who believes that it would.

The other question is about who can bring proceedings. I can see why the way the bill is drafted is a bit confusing, because I do not think that it is as clear as it could be on that point—what does "having an interest" mean, exactly? There is a body of case law on that kind of thing and, as Professor Norrie pointed out, generally a person has to have some personal interest in a case before they can bring it. They cannot just bring a case on some abstract issue of injustice that happens to bother them.

The whole point about the bill is that it did not adopt the victim test, which is very important. It differs from other human rights provisions in that it does not say that a person has to be a victim. That was a very deliberate decision and the result of a lot of lobbying at earlier stages.

09:30

However, that still leaves a lot of ambiguity about the role of third parties bringing cases—class actions—as Dr Boyle explained earlier. There is great value in class actions as a way of having the rights of whole groups of people respected. Therefore, although the Children and Young People's Commissioner Scotland is mentioned specifically, which is a good thing, more clarification is needed of who can bring the action. The policy memorandum is written in terms of sufficient interest, which would be the usual test, but my suggestion is that it should not be the usual test for who can bring cases. In addition to the commissioner, there ought to be a formulation that would allow other bodies, such as non-governmental organisations, to bring actions in respect of children's rights, so that there would be a broader opportunity for challenge.

Professor McHarg: There is a misconception about what the sufficient interest test means in judicial reviews. It is a relatively new test that has been interpreted very widely, so it does not necessarily require a personal interest and it allows for representative standing, which means that groups can bring actions on behalf of their members where their members are affected. It also allows for public interest standing, so that people can bring cases if there is a general point of law that needs to be resolved in the public interest. As Professor Sutherland pointed out, the bill does not employ the victim test. Under the Human Rights Act 1998, the victim test has precluded those kinds of representative and public interest cases. The absence of the victim test means that the normal rules of standing in public law and judicial review cases will apply, and that is now interpreted very widely.

The Convener: Can I bring Katie Boyle in now on the questions on who can bring court proceedings and the time limits for those?

Dr Boyle: I do not have anything to add. My colleagues have covered everything in that regard.

The Convener: We will move to questions from Alexander Stewart.

Alexander Stewart (Mid Scotland and Fife) (Con): Part 3 of the bill refers to the children's rights scheme and the child rights and wellbeing impact assessment. On the provisions for the children's rights scheme, it has been suggested that the bill's language could be stronger. Do witnesses agree with that? Should anything be added to the scheme? What are the witnesses' views on the legal duty of ministers under the legislation to prepare child rights and wellbeing impact assessments, and to what extent should ministers have discretion in dealing with decisions of a strategic nature in relation to children's rights and welfare?

Dr Boyle: I will respond on the children's rights scheme. The idea of the scheme is to help ministers to meet their obligations under the treaty. There is a read-down that the state obligations become obligations of ministers and public authorities so, in a sense, the scheme helps them to take the steps to demonstrate that they are meeting some of the obligations under the treaty. The obligations relate to, for example, participation, the awareness and promotion of rights and budget processes. The bill is phrased such that the scheme "may" take those things into consideration. That might be appropriate for some rights under the convention, but the state has

other positive obligations in relation to economic and social rights in the bill, for example.

My concern is that the list in section 11 is not exhaustive and that, in relation to some rights under the convention, there are obligations, not discretionary things that can be taken into consideration. It would be helpful to broaden out an understanding of what the duties mean in practice. It is important that support is rolled out for decision makers, as well as for ministers and Parliament, so that there is understanding of the content of the rights, what they mean and how to meet them in practice.

Other positive obligations include, for example, taking steps to realise rights and ensuring that the state has the mechanisms in place to respect, protect and fulfil rights. For some rights, there is a minimum core obligation—a more immediately achievable level of right has to be achieved, and children should not fall below that level.

There are also progressive duties under international human rights law and the convention that relate to non-discrimination and the state meeting the maximum available resources, which is a necessary component. It should be ensured that resources are deployed in an effective, efficient, adequate and equitable way. Such duties should fall under the scheme. We should also ensure that there is no regression on rights and that there is access to effective remedies.

There are other types of duties under the treaty, so the scheme could be clearer. You could ensure that it is clear that the list is not exhaustive, or further clarity could be provided with regard to the other obligations. As I said, I am not totally comfortable with the idea that the obligations are discretionary rather than compulsory.

The Convener: I will bring in Aileen McHarg on Alexander Stewart's questions about the strength of the language that is used in relation to the scheme, and on child rights and wellbeing impact assessments.

Professor McHarg: The only point that I want to make is that the obligations apply only to the Scottish ministers. The policy memorandum says that other public authorities will be "encouraged" to do those things, but they are not obliged to do so. That is a gap.

The obvious analogy is with the Freedom of Information (Scotland) Act 2002. All public authorities that are subject to that act have to draw up publication schemes, which is an important way of proactively ensuring transparency, rather than relying on people to enforce rights individually. I would like such things to be more broadly applicable.

The difficulty relating to the definition of a public authority is that, unlike the 2002 act, the bill does not specifically list the bodies that are covered by it. You would need to define precisely which bodies were covered. I would like a broader range of bodies to be included.

In case I do not get to say this later on, I note that it is important that, when ministers make compatibility statements when introducing legislation, they have to reason those statements in terms of the impact assessments. That is a huge improvement on the model that is used in the Human Rights Act 1998 and the Scotland Act 1998, under which reasons do not have to be given. I can see the case for making the obligation to draw up an impact assessment broader, but we will get into definitional issues.

The Convener: I ask Professor Norrie to comment.

Professor Norrie: I do not think that I have anything useful to add to what has already been said.

The Convener: Does Elaine Sutherland wish to add anything on those matters?

Professor Sutherland: I do. I have a couple of terribly technical points, the first of which Dr Boyle covered rather fully. It concerns the difference between the words "must" and "may". As she said, under the children's rights scheme ministers "must"—as opposed to "may"—do certain things. I think that we are all very clear on the importance of that distinction, so I will not take up the committee's time by going into too much detail on it.

There is another low point. It was from section 1 of the Children and Young People (Scotland) Act 2014 that we first got the idea of ministers having to report to the Scottish Parliament on what they were doing on various aspects of children's rights, one of the most important being what they would do to promote and strengthen such rights out there. That provision requires ministers to report every three years. The 2014 act gave a date for when their first report had to be lodged, which was within three years of the section coming into force.

That approach will go under the bill, because there will be a new approach to reports from the Scottish ministers under the children's rights scheme. Under that, they will report about what they are doing on children's rights a lot more—and they will have to do so every year. It will be good to have more frequent reporting and more accountability. However, I can see nothing in the bill that indicates when that first report has to be made. If I recall correctly, all that it says is that ministers must indicate in the scheme when their first report will be.

When that first report must be produced is therefore entirely within ministers' discretion. Under the scheme, they could decide that they will produce it five years down the road, which would be a longer interval than is provided for under the 2014 act. Thereafter, they would have to report every year. However, at this stage there is nothing to trigger or activate the whole process. Therefore, we need to consider having a provision parallel to that in the 2014 act, which would say that the report had to be produced within a year of the section coming into force.

That brings up another issue that is vaguely off at a tangent, but which I would like to raise now because I am afraid of not getting it in at some point. It concerns the business of ministerial discretion about when things happen. That raises a point about section 40 of the bill, which covers when the act would come into force, assuming that the bill is passed. Again, that is left entirely to ministerial discretion. Although that does not concern the children's rights scheme, it leaves another aspect to ministerial discretion. That seems to be a flaw that permeates what is otherwise, in many respects, a very good statute. There is too much discretion for ministers on when they have to produce their first report and on when the bill as enacted would come into force.

I am not sure that I have anything to add on impact assessments, save to say that, again, there is an issue with there being too much ministerial discretion. Ministers must prepare such an assessment

"in relation to such decisions of a strategic nature relating to the rights and wellbeing of children as they consider appropriate."

That is another example of there being huge opportunity for exercising such discretion, which I would like to see being reined in a bit.

The Convener: Katie Boyle would like to add some comments to her previous remarks.

09:45

Dr Boyle: In the children's rights scheme, the reporting procedures and impact assessments help decision makers and duty bearers to comply with their obligations, but they do not dispense with those obligations. There are positive duties that duty bearers must take, regardless of whether those mechanisms are in place. This is just a means of helping with implementation. It does not absolve those duty bearers of other obligations; they must take positive steps.

Professor McHarg highlighted the issue of the public authority. The Parliament is not covered by that definition, and it also has obligations in relation to the treaty that are not in the bill. The administrative sphere of decision makers, including public authorities, must go further than merely reporting. They must take positive steps to fulfil rights. There might be more scope to explore what that means in practice and to help them to meet that obligation.

The Convener: Alexander, do you have any supplementary questions?

Alexander Stewart: No. I am content with the information that has been given.

Alex Cole-Hamilton (Edinburgh Western) (LD): Good morning. The UN Convention on the Rights of the Child is two things, principally. First, it is an international baseline that the United Nations sets as the standard for children's rights. The UN says that it will accept nothing less than that, and it wants states to go further. Article 28, on child soldiers, is a good example of where the UK and Scotland do better than the UNCRC. We do not allow children to become soldiers below the age of 16, whereas the baseline is 15. However, we are behind on issues such as the age of criminal responsibility. The UNCRC wants that to be 14; we have set it at 12, but we have not implemented that.

Is it imperative for Scotland to get to the floor on all levels so that we can make a moral claim to have fully incorporated the UNCRC?

Dr Boyle: I am sorry, but I missed the tail end of the question. Could the member repeat it, please?

Alex Cole-Hamilton: Do you think that there is a moral imperative for Scotland to get to the baseline level on all the articles and all the general comments, so that we can morally conclude that we have incorporated the UNCRC into Scots law?

Dr Boyle: The moral imperative is a policy matter rather than a legal one. There is a legal imperative. Whether it is enforceable in law is another matter, but the UK signed up to the treaty, so as an absolute minimum, it has a legal obligation to meet the standards that are set in the treaty, which are minimum standards. It is great if states can go beyond those. The treaty just sets a framework for the minimum standards, but it is a legal obligation.

The bill tries to facilitate an enforceable legal obligation. That would not exist without incorporation. Some parts of the treaty are redacted because of matters that are reserved rather than devolved. For example, the recruitment of soldiers is part of that redaction, if I remember correctly. In so far as it is possible to do so, everyone in Scotland who exercises public authority on behalf of Scottish bodies—whether that be the Parliament, the Government, public authorities or private authorities that perform public functions—should seek to comply with the

standards, even where there has been redaction because competence has not been devolved.

Professor McHarg: I do not have a particular view on the issue. Katie Boyle is right to say that there are issues of divided competence.

I would also point out that the Parliament is not under any legal obligation, as a matter of domestic law, to implement the convention. The state is under an obligation, as a matter of international law, to comply with the convention.

Professor Norrie: I want to make two points in response to Alex Cole-Hamilton's important question. First, the single greatest argument in favour of incorporating the UNCRC is that it turns an international obligation into a domestic legal obligation. That gives it more force. With an international obligation, even though international law is law, politics can get in the way. Governments and states can decide that international law does not apply to them, and there is no enforcement mechanism. The single greatest argument in favour of incorporating the UNCRC is that it turns a moral imperative into a legal imperative.

Secondly, Alex Cole-Hamilton mentioned, quite rightly, that the convention sets minimum standards. There is a provision in the convention—article 41; it is set out in the schedule to the bill—that permits states to go further. I have a suggestion to make, which is to enhance article 41 somewhere in the bill. That goes back to the point that I made some time ago, which is that I fear that parents and others will hijack children's rights in order to limit children's rights, for example by arguing that it is a child's right not to hear people talk in a particular way and not to be exposed to literature that shows that a lesbian, gay, bisexual and transgender lifestyle is a legitimate lifestyle. Arguments such as those limit children's rights, and we need something in the bill that protects us against that. Article 41 helps to some extent, but I do not think that it goes quite far enough.

I would like an equivalent to section 13 of the Human Rights Act 1998, because that says that courts must pay particular regard to the importance of article 9 of the European convention on human rights. I would like the bill to be amended to say that the courts should pay particular regard to the importance of article 41 of the UNCRC. That would bring it immediately to courts' attention that article 41 is a minimum standard and ought not to be used in a way that deals with an adult agenda but limits the rights of children.

Professor Sutherland: I agree that the strength of the bill, and the reason it should be supported, is that it is taking that state obligation and bringing it into Scots law. The parallel with the Human Rights Act 1998 makes it very important.

Another benefit of the bill is that, hopefully, it will generate conversations in Parliament, in the community and in schools—wherever you find children—about children's rights. In doing that, it will raise the profile and the understanding of children's rights. I come back to the idea that it is not enough to have this stuff in legislation and think that we are done. We need to make it work, so the practice needs to follow through, and the bill contains mechanisms to ensure that that happens. However, we also need to embed it in the community, so that people understand it. That goes back to the point that I made earlier.

On satisfying the minimum requirements of the convention, Scots law should be trying to achieve that, but frequently it should be trying to go further. In my answer to the first question that I was asked, I talked about examples of cases where we have gone further and how that is fine—these things are beneficial. I think that we should see what the convention is asking us to do—or telling the state to do—as a minimum threshold, and go beyond that, where that is possible and appropriate.

Alex Cole-Hamilton: There is another part to that question, after which I will ask a quick follow-up question, if the convener will bring me back in.

I said that the UNCRC was two things. First, it is a baseline. Secondly, it is a living document. Alongside the articles that are enshrined in the convention are three other organic things: the optional protocols, the general comments and the concluding observations from the rapporteur when the rapporteur visits our country. Are the witnesses content that the bill is sufficient to allow Government to reflect on those three organic arms of the convention, such that it will make the UNCRC a living document in Scotland when we have incorporated it?

The Convener: Do you want to direct that question to a particular witness?

Alex Cole-Hamilton: Professor Norrie.

Professor Norrie: Thank you. That is absolutely right. It is really important that Government and the courts and public bodies are directed to as many of the official documents and working papers as is possible. That is the only way that we can identify appropriate trends and gaps in the provisions and then bring them properly into force in a practical, meaningful sense in Scotland. I absolutely agree with that.

The Convener: Aileen, would you like to come in on that question?

Professor McHarg: No, thank you.

Alex Cole-Hamilton: Okay. If no one else wants to come in on that, I will move on to my final question—

The Convener: I am sorry, Alex—Elaine Sutherland wishes to come in.

Professor Sutherland: Yes, we want Government to look at all those things and to be as informed as possible on what the United Nations Committee on the Rights of the Child is telling us. The sad truth as far as optional protocol 3 is concerned is that the UK has not ratified it and does not look as though it is in any rush to do so, and there is nothing that we can do in Scotland to ratify it. It is a matter for the state party whether it ratifies an optional protocol.

For the benefit of any committee members who might not be clear on what it is, optional protocol 3 is about what is called in United Nations-speak a "communications procedure"; it is really about complaints about violations of the convention. We have not ratified it, and Scotland has no power to do so, so we are a bit hamstrung on that one.

The Convener: Katie Boyle wishes to come in, too.

Dr Boyle: The question succinctly identifies a gap. That gap can be addressed by an amendment to section 4 of the bill, in so far as interpretation requires to be undertaken with regard to the UN treaties, treaty body decisions, optional protocols, general comments, recommendations and comparative law. I reiterate what I said earlier about the example from South Africa, where courts must have regard to international law and may have regard to comparative law. That is a useful example to draw on. Section 2 of the Human Rights Act 1998, under which the courts must have regard in interpretation to ECHR jurisprudence, is not dissimilar.

It is a question of ensuring that, when an interpretation is made, that is done in context. Otherwise, it will not work, and we will end up with a Scottish version of the UNCRC that is not necessarily interpreted in its context, which is international human rights law.

Alex Cole-Hamilton: Thank you for those answers.

My final question is about commencement; it is one thing to pass an act but another to commence it. It is now nearly two years since we passed the Age of Criminal Responsibility (Scotland) Act 2019 in the Scottish Parliament and our age of criminal responsibility is still eight. We have not yet made it 12 and I am not clear why that is. Section 40, on commencement of the act, leaves it up to ministers to determine when it will come into force. First, are the witnesses content with that? Secondly, can they point to any barriers or impediments that would create an unnecessary delay in commencing the provisions of the act?

10:00

Dr Boyle: Commencement is a policy decision, so I do not have a legal response to that question, other than to say that, ideally, it would be done without delay. Other countries, such as Sweden, have had a run-in period to allow those who will bear obligations under the incorporation act to have time to catch up. My concern is that there have been obligations to be aware of the duties under the UNCRC since 2014, so, ideally, you would commence without delay but, ultimately, that is a policy decision.

Professor McHarg: There are provisions on the statute books that have been languishing unimplemented for a lot longer than two years, so that is an issue at times.

The argument for a delay in commencement would be to allow public authorities to get up to speed with their obligations under the act. In all the big changes in public sector duties over the past 20 years, there has been a delay. There was a year or so for the Human Rights Act 1998, three years for the Scottish freedom of information legislation and five years for the UK freedom of information legislation. If we go back to the Equal Pay Act 1970, there was a five-year delay in its being implemented.

If you were concerned, the obvious thing to do would be to set a date by which particular provisions had to be brought into force, but it would be reasonable to give a fairly substantial period before implementation, to allow proper compliance with the legislation.

Professor Norrie: I would prefer a specific date, rather than it being left to ministerial discretion, because a specific date focuses people's minds. A reasonable—and reasonably short—period after royal assent should be allowed.

Professor Sutherland: Earlier, I mentioned that I did not like the discretion that was left to ministers. I understand that public authorities need to take on board what they have to do, but they have been aware of the convention since well before the legislation in 2014, so it is not coming to them out of the blue. There should perhaps be a period before implementation, but it should be very short. It should be specified in the act that implementation should take place within a certain period after royal assent, rather than it being left to the discretion of ministers.

The Convener: Thank you. That draws our first evidence session to a close, and I thank Dr Boyle,

Professor McHarg, Professor Norrie and Professor Sutherland. I appreciate your joining us so early this morning and your perseverance in the face of our technical difficulties. If there was anything that you wished to share but you did not get the opportunity to do so, please correspond with the committee. Likewise, we might follow matters up with you.

I suspend the meeting to allow us to set up for the second panel.

10:04

Meeting suspended.

10:10

On resuming—

The Convener: Welcome back, and good morning to our second panel of witnesses. They are: Morag Driscoll, from the child and family law sub-committee of the Law Society of Scotland; Janys Scott QC, from the Faculty of Advocates; Andy Sirel, from the Scottish refugee and migrant centre at JustRight Scotland and Professor Kay Tisdall who is a professor of childhood policy at University of Edinburgh. Thank you all for joining us this morning.

I will invite members to ask questions. If a question is directed to a specific witness, the member will identify that witness. Otherwise, we will work through the witnesses in the order in which they appear on the agenda. We need to conclude this session no later than 11:45, so it would be helpful if we could try to keep questions and answers succinct. There is no need to adjust your microphone or camera—broadcasting colleagues will do all that.

There is strong support for direct incorporation of the UNCRC into Scots law. What are witnesses' views on the approach that the Scottish Government has taken? I am particularly interested to hear what you feel the benefits are and whether you think that there are any disadvantages to that approach.

Morag Driscoll (Law Society of Scotland): Thank you very much for inviting me today. The law society is very much in support of the bill and—[*Inaudible*.]—more accessible and better recognised in Scotland.

Can you hear me?

The Convener: You are coming through, but it is crackling a little bit. If that continues, I will ask broadcasting to cut your video so that we can hear you clearly.

Morag Driscoll: All I had to say was that the law society welcomes the bill.

The Convener: Do you see any disadvantages to the approach that is being taken?

Morag Driscoll: I listened to the earlier part of the meeting, and, to use Elaine Sutherland's words, I endorse the comments that were made during that session.

I do not feel that I can answer the question in great detail at this stage, so I will pop it on to Janys.

Janys Scott QC (Faculty of Advocates): I welcome the opportunity to give evidence on the bill on behalf of the faculty. The faculty very much respects the rights of the Parliament to set its policy on incorporation of the UNCRC.

In response to the question about benefits or disadvantages, I would frame them as "challenges", because practitioners are being set the challenge of dealing with translating an aspirational convention into rights in individual cases.

It is helpful that the Parliament has chosen to follow an established path by referring to the Human Rights Act 1998. An example of that, which has not been mentioned by my academic colleagues, is that section 19 of the bill adopts the model from the human rights act. Section 19 says:

"So far as it is possible to do so ... legislation"

is to be

"read and given effect in a way which is compatible with the UNCRC requirements".

That will enable us to face the challenge that the Parliament has posed us by, if appropriate, reading down the legislation. That is a very powerful thing to put in the hands of the courts, because it means that at court we can take a red pen to or read in passages of legislation that will enable the UNCRC requirements to be better met.

10:15

Andy Sirel (JustRight Scotland): Thank you, convener and committee members for inviting me. JustRight Scotland welcomes what is an extremely strong bill, notwithstanding the recommendations in our written evidence, which we will make again today.

We are in favour of the broad, maximalist approach. In particular, we appreciate the bill's distinct proactive and reactive elements. The upstream measures—the children's rights scheme and the child's rights and wellbeing impact assessment—are really important, because we hope that they will help to obtain compliance at an initial stage of policy making and law making and help to iron things out before they come into force.

As a litigator who represents children, I do not want to go to court for children; we avoid that at all costs, so while it is great to have that upstream dynamic, we need the downstream reactive measures. We need enforceability, and the bill is strong on that. It uses language that is familiar to us as human rights practitioners, and it uses remedies that we have used before, albeit in slightly different ways. It would create positive changes to some existing processes, with regard to issues around standing and time limits, which I would like to speak about later. It would change things dramatically. It would allow me, for example, to go to court and say to a judge, "This is a violation of the UNCRC." At the moment, the judge would say, "That is all very well, thank you, Mr Sirel, but I can't do anything about that." After the bill is passed, the judge would be able to act—that is it in a nutshell. We welcome the bill.

Professor Kay Tisdall (University of Edinburgh): I want to check that you can hear me.

The Convener: Yes, we can hear you.

Professor Tisdall: As you will have seen in our evidence, we think that it is absolutely wonderful to have the bill and we only want it to be strengthened through the legislative process. To give an example of that, as the Observatory of Children's Human Rights Scotland, we were recently commissioned by the children's commissioner to do the CRIA that was submitted to the committee, as you know. That underlines the fact that taking a children's rights approach makes better policy and, we hope, better practice. From carrying out the independent CRIA, it became apparent that, in times of crisis, there are issues that are not paid sufficient attention, from schools being open to provisions for children affected by domestic abuse. That CRIA experience and focus on children's rights drew our attention to that, leading us to make the real differences that are really important to children.

The Convener: I will bring in Mary Fee.

Mary Fee: Thank you, convener. I want to explore two areas with the witnesses, the first of which relates to section 4 and the interpretation of the UNCRC requirements. Do witnesses think that the interpretation should be expanded to take account of general comments or concluding observations? If so, might there be any unintended consequences of doing that?

Secondly, on public authorities, witnesses who listened to the previous evidence session will know that I asked those witnesses whether the definition of "public authority" should be expanded to take into account every organisation that has contact with a child, whether it is a private organisation, a third sector organisation or the children's hearings system. I am particularly keen to hear the Faculty of Advocates' view on children's hearings, because it was the faculty's evidence that queried whether the children's hearings system would be included.

Finally, I would be grateful for the witnesses' view on what a public authority should do if faced with secondary legislation that is incompatible with the requirements under the UNCRC.

The Convener: Mary Fee mentioned the Faculty of Advocates, so we will go to Janys Scott first.

Janys Scott: I will deal first with general comments. Those are helpful as interpretive instruments; it is useful for a court to have all the assistance that it can get in interpreting a particular piece of legislation, as long as that element is not determinative. It would be difficult if that were the case—one would not want to have an external body dictate to Scottish bodies what they should do. Helpful, yes—determinative, no. General comments should be taken into account, by all means, but within the domestic context.

With regard to the definition of "public authority", Kenneth Norrie was right to say that a children's hearing is a public authority. I am trying to find whereabouts in its submission the Faculty of Advocates mentions tribunals—I do not think that it was quite in that context. I will come back to that in writing, if I may, but I do not think that the faculty mentioned tribunals in that context specifically.

One of the points that arose in the academic discussion was what to do about private organisations exercising public functions on behalf of public authorities. It is important to clarify that, if a private organisation is exercising a public function, it is to be treated as a public authority. That is vital to the operation of the bill.

I hope that that covers all the points.

Mary Fee: Yes.

The Convener: We will go to the other witnesses, starting with Morag Driscoll, for comments in response to Mary Fee's questions.

Morag Driscoll: I fully agree with Janys Scott. As Elaine Sutherland said earlier, the more tools that we have, the better. Again, general comments should not be determinative, but they should be available to the court to assist its understanding of the meaning of the UNCRC, which is, of course, a flexible document. If general comments come out, we would be ignoring a valuable resource if we did not include them in consideration.

I agree in respect of private organisations that carry out functions. The best illustration of that would be services that provide advocacy for children in children's hearings. If they are carrying

out what is, in effect, a public function, they should be obliged, as public organisations are—[*Inaudible*.]

We would be ignoring the people who are at the coalface—[*Inaudible*.]

Andy Sirel: With regard to section 4, which is "Interpretation of the UNCRC requirements", I agree with Morag Driscoll and Janys Scott. That point speaks to a question that Alex Cole-Hamilton asked of the previous witnesses. He talked about the convention as a living instrument, which means that the scope of the rights develops gradually as time goes by, in alignment with societal attitudes. That is a well-known autonomous concept in international human rights law; it is applied in the context of the European Court of Human Rights.

The policy memorandum to the bill, at paragraph 144, highlights the need to emphasise

"on the face of the Bill that the rights ... remain within their context",

and states that those rights must be looked at in the context of

"the whole UNCRC and optional protocols".

The context is not just local.

In the context of the European convention on human rights and the Human Rights Act 1998, our courts are required, under section 2 of the 1998 act, to take account of judgments from the Strasbourg court: the European Court of Human Rights. Those cases—whether they are against the UK, Hungary or Azerbaijan—are not determinative, but they must be taken into account.

We do not have an equivalent in the bill, and we do not really have an equivalent of the European Court of Human Rights in the context of the UNCRC. What we do have are concluding observations, general comments and other interpretative sources. That is why those elements are important and should be included in the bill, because that would allow our courts to look to such things to see a modern manifestation of what the rights look like now and apply that to the Scottish context. I agree with Janys Scott that those elements should not be determinative, but should be a source of inspiration.

With respect to section 6, on public authorities, I have sympathy with the drafters of the bill. I appreciate the intention behind keeping the wording as broad as possible, and I agree with what the policy memorandum says about the intention, but I worry about how the provisions will work in practice.

There were references in the policy memorandum to a long history of litigation around what a public authority is. That long history has not left us in a settled—[*Inaudible*.] Just last year, the inner house and the outer house of the Court of Session were in complete disagreement on the fundamental test that should be applied. They had differences of interpretation on the test. If we still have Scottish courts disagreeing with each other on the same set of facts after 20 years of litigation, that is problematic.

It might be helpful for the committee to look to other sources of inspiration. In its written submission, the Scottish Human Rights Commission give a very detailed assessment of the issue, and JustRight Scotland did the same in our submission. Down south, the Joint Committee on Human Rights has looked at the issue twice and has suggested wording. I like the wording that refers to a contract or other arrangement with a public authority that is under a duty to perform the function.

The problem is that, if we do not have something more specific and we take a slightly inconsistent or unclear approach in the courts, that will leave us with a lack of certainty about who is under the duties and when. That is not a very good place to be. We want local authorities to be certain about what they are doing in relation to their corporate procurement, we want private parties to be certain about their obligations when they enter into a procurement exercise with a local authority, and we want children, young people and families to understand when, and in what circumstances, they are able to access their rights.

In the children's sphere in Scotland, there are private foster care placements, private care homes, social work functions and aftercare functions that are completely outsourced to charities. There are mixed models. Leaving it to judicial interpretation has not got us into a very good place, so additional wording in the bill on the issue might be useful.

Professor Tisdall: I will address the first two parts of the question. As the committee will know from our evidence, we advise that courts should have a duty to have due regard to the general comments, the concluding observations and the decisions under the third optional protocol.

For example, we recently made suggestions about the bill that became the Children (Scotland) Act 2020 in relation to family law. It was incredibly useful to the discussions to consider the general comment on article 12, in order to realise that there should not be a threshold that has to be met in relation to a child's capacity before their views are considered. That shows the value of considering such comments, and it seems that the courts having a duty to have due regard to them would be an appropriate balance. As you know, we think that that duty should also be applied in

relation to the children's rights scheme and the children's rights and wellbeing impact assessments.

The public authority issue seems to be very serious, as Andy Sirel has documented. It is really important that there are firm provisions on that in the bill. It is clear that a lot of children's lives are affected by private organisations that arguably carry out public functions, including the provision of child care, housing and residential care. That is a key issue on which we need to follow the Scottish Government's intention, in order to ensure that the bill is clear.

The Convener: Mary, do you have any follow-up questions, or are you content with those answers?

Mary Fee: I am content. I am very grateful for the comments on the definition of a public authority. We will take much more evidence on that and give it careful consideration.

The Convener: Thank you. With Fulton MacGregor's permission, I will bring in Gillian Martin before him, as she is unable to stay for the whole session.

10:30

Gillian Martin: I am grateful that you are able to bring me in early, convener.

Section 7 says that an individual or organisation may raise court proceedings in respect of an alleged breach of the duty of public authorities. The bill also specifically empowers the children's commissioner to raise such proceedings. For judicial review actions, the Government's policy intention is that any individual or organisation would require to demonstrate sufficient interest to be able to bring such proceedings. How do the witnesses interpret that? Is it clear enough what sufficient interest is, and are you happy with the overall approach, including how the Government's policy intention is given effect to in sections 7 and 10?

Supplementary to that, I ask about timing. Submissions to the committee have had mixed views on whether it is correct to exclude the period when a young person is under 18 when calculating the time limits for raising court proceedings under section 7. What are the witnesses' opinions of when it should be possible to initiate court proceedings?

Morag Driscoll: This is complex stuff, as we heard in the earlier part of the meeting. It would be unfair to treat a child in the same way as an adult when it comes to time limits. There are also concerns about the potential of somebody waiting 10 or 15 years to bring a proceeding, but that is likely inevitable. However, I would suggest that it is entirely appropriate to keep the time limit for children. There are some practical issues with the operation of section 7 because of the potential for delay. When it comes to early action by children, six months in the life of a child is like three years for an adult, so delay must be avoided. However, the remedy in the bill must be retained. It is, of course, discretionary—it is decided case by case—and it is important that courts retain that discretion.

On the first question, the children's commissioner is the logical person to initiate such proceedings, but I agree with what was said in the earlier session about the potential for class action. We do not want the problem of adults using the legislation to export issues that are really for adults. However, there will be times when a problem becomes apparent, and perhaps a charity that deals with that area would wish to raise a proceeding on behalf of children who are affected by that problem or children throughout Scotland.

Then again, in many ways it is a matter for the courts to say whether that is acceptable. Perhaps there could be provision for discretion, or some guidance. I would rather leave that aspect to Janys Scott, who would be the sort of person doing it.

Janys Scott: The provision relating to the Children and Young People's Commissioner Scotland is most welcome. When I was giving an opinion on the equal treatment issue, I was conscious that the commissioner in Northern Ireland had tried to challenge a similar deficit in Northern Ireland law and had been knocked back on the ground of lack of interest. It was an appalling prospect that one had to wait for a child victim before one could challenge something that was deficient in terms of children's rights. Allowing the children's commissioner to be proactive on that point will be hugely important for the implementation of the bill and the recognition of children's rights in Scotland.

On the question of sufficient interest, the courts, as you can appreciate, interpret that very broadly. It is a question of striking a balance so that we do not admit busy-body actions, where somebody who does not have a direct interest raises proceedings, but we allow somebody who has an interest to intervene in proceedings and assist the court in reaching a decision. That is a balance to be struck in relation to instigation and intervention.

On the timing issue, the problem is that one has to look at what remedy one is asking for. If one is asking for a judicial review remedy, one is saying that a decision has been reached by a public authority that is unlawful and that, therefore, it requires to be addressed or struck down—an order requires to be given to say, "Don't do this," or, "Please do that." If you are looking to address

an unlawful decision, it is no good waiting 10 years, because we want that to be done there and then, and if you wait 10 years, it is going to be entirely academic because the whole point will be lost. It will be lost for the child and it will be lost for the public authority. It will not be conducive to good administration or the proper recognition of children's rights to bring up a stale case 10 years later when the whole point is gone. Therefore, if it is a judicial review remedy, there is not much point, frankly, in saying that the child can bring it up, or it can be brought up on behalf of the child, 10 or 15 years later.

Damages are a different issue, because you might want to say that, 10 years ago, a child suffered a wrong, which has not been properly recognised, and that we can now recognise that in damages. I can see that argument. On the other hand, the judgment in the case of A v Essex County Council in the Supreme Court reasoned that it would not allow the case to be brought up after the end of the year's time limit because the amount involved was going to be quite small and it would be disproportionate to require a public authority to go back, potentially many years later, to consider the damages question.

Therefore, on judicial review, the answer is pretty clear that matters ought to be dealt with quickly and that there is no point extending the time limit. On damages, there is a proportionality issue to be addressed, and you might want to look at that with regard to permitting the court to hear a late claim if it is considered appropriate. However, leaving it open in that way will potentially cause more problems than it will address.

The Convener: Andy Sirel, I will come to you now on Gillian Martin's points about who can bring court proceedings and the time limits.

Andy Sirel: On the first question about sufficient interest, I like that part of the bill. I like the fact that the victim test, which we find in the Human Rights Act 1998, has not been included. It is a significant widening of access to justice. I hear what you are saying about what "sufficient interest" means. As a lawyer, I am not particularly vexed by that issue at the moment because, as was said by Janys Scott and, I think, Aileen McHarg on the previous witness panel, the courts, through AXA General Insurance Limited and others v the Lord Advocate and others and Walton v the Scottish ministers, have interpreted "sufficient interest" pretty widely, to be honest. As a lawyer, I feel that we have a good sense of what it means in practice. However, I have a slight concern about the broader on-going UK-wide discussion, emanating from the UK Government, about looking at judicial review and standing and who can take cases. I have a slight concern about the direction in which that is going, which might look to narrow the definition of "sufficient interest", and that could play out further in the courts. I am not sure what we can do about that. Perhaps a means of moving it forward in the bill would be to include the words "sufficient interest". That might be helpful but, again, if the scope narrows in the courts, that does not take us much further. Therefore, I have a slight concern about that but, as it stands, sufficient interest is good.

It is a significant move forward that a child does not need—[*Inaudible*.] I will give a quick example: I am working with an asylum-seeking young person, who was dispersed this summer into adult accommodation in a hotel in Glasgow this summer that was in terrible condition. My colleagues and I were looking at the prospect of bringing a case to challenge the action of holding asylum seekers, never mind young people, in hotel accommodation with no money. My client was undergoing numerous types of legal process at the time—the age assessment, the asylum process and so on—and he was very unwell and suffering trauma. He was not really in a place to even have the capacity to instruct me to take another case challenging his accommodation. If we did not have the victim test, my organisation or another organisation would perhaps be able to take that case on his behalf. That is the difference; it is substantial.

With respect to the time limits, I note—with great trepidation—that I will probably depart from Janys Scott's view; I do not often do that, but I have to do so here. There are two broad reasons why I am in agreement with what is in the bill in respect of section 7 on time limits, the first of which Professor Norrie flagged during the earlier panel. It takes into account the evolving capacity and maturity of children and young people as they get older, allowing them to have a say on acts that were done to them when they were too young to take any action themselves. The fundamental aspect—[*Inaudible*.] That is the first, very basic point.

The second point speaks to the balance of power, which we need to bear in mind and remember. The balance of power most definitely favours public authorities or providers and not the child. There is, of course, a requirement for a level of certainty in order to facilitate good governance. I believe that the bill does not place an onerous burden on public authorities, especially when considered next to the onerous burden that is placed on children to meet strict time limits.

I cannot recall who, but someone on the previous panel described the legal justice system in this country as designed for adults by adults. That is true. I will give the committee a practical example from our own recent experience, which I am afraid is not unique; I could regale the committee with examples all day. This example concerns a child who, having escaped a cannabis

cultivation situation, is living in adult accommodation. They were age assessed by local authorities as being over the age of 18 and the assessment outcome was communicated to them verbally through an interpreter. The person therefore knew the outcome of the assessment but did not quite grasp the reasoning, and they were not provided with a written report for another four weeks.

That young person has no experience of living in Scotland, no money, no English language, no education, no social worker, limited practical support and serious trauma. They were at continued risk of retrafficking. When they were eventually referred to my service and we attempted to challenge the assessment in question, the local authority fought hard to knock the case out on the basis of its having been submitted outwith the three-month time limit, in its interpretation of the time limit. The court applied the law and noted that the time started running from the date that he was told of the decision orally and not from the date that it was written to him. That is an application of the law. In the specific facts of the case, it extended the time limit.

There are key things to take away from that. Children and young people are at an inherent disadvantage. Very often, the support that they receive is from the corporate parent against whom they would be taking a case. Many children are looked after and guided by that corporate parent. They may be unaware of their ability to take a case or fearful of doing so. They therefore need an independent third party to help them access that—[*Inaudible*.] Then there is the bureaucracy: we need to instruct a lawyer, qualify for and obtain legal aid and engage an advocate. The real burden therefore lies with the child and not the public authority.

The second point from my example is that public authorities will use every tool in their legal arsenal to defend a litigation. It is right that they are able to do so and it is right that their advocates—whether that is Janys Scott or anybody else—and legal team advise them as such; that is fair and proper. If the tool is in the shed, they will use it, regardless of the age of the child. There should not be any uncertainty about that.

The current law on time limits in Scotland is robust. Janys Scott's example from the Supreme Court is one example of that. The outer house held this year that time limits run from when a decision is made and not even from when a person knows about it. As they are, those time limits and strict procedures represent at present a barrier to children taking cases.

Other hurdles need to be cleared to bring a claim for judicial review. In evidence that I have read, there are examples of cases being taken 15 years later. To bring a judicial review, the young person needs to prove merit and, if a case is stale, that could be taken into account by a judge at the permission stage.

10:45

The committee has two options: leave it the way it is or, if you are not minded to do that, make the discretion to extend far wider and more explicit to take into account children's specific circumstances.

I am sorry for my long answer.

The Convener: It was very helpful. It aids the committee to have specific examples of what the issues mean in real life and to young people, so that we do not talk about it in the abstract all the time.

Professor Tisdall, is there anything that you wish to share with the committee on Gillian Martin's questions on court proceedings and time limits?

Professor Tisdall: I have had the benefit of listening to today's evidence sessions, and I endorse the discussion about sufficient interest and ensuring that the intention on that is clear in the bill.

On time limits, I am persuaded by Andy Sirel's presentation. We know from the research evidence that many children do not realise until they are older that their rights have been breached, which is important for the Government's intention in regard to time limits. I will pick a second example of that, which is of power imbalance. We have heard from looked-after children that they might find it difficult to take an action against their corporate parent until they are older. That is another example of why we need to take account of children's perspectives.

Fulton MacGregor: I will continue with questions on the accessibility of courts and tribunals to children and young people, which I asked the earlier panel of witnesses and which follow on nicely from the exchanges that we have just heard. Are the existing services accessible? If not, what improvements are required? We heard a lot of good evidence on that during the previous evidence session. Can the witnesses think of specific ways in which the Scottish Courts and Tribunals Service could be made better? For example, in the criminal justice world, there is a lot of talk about the barnahus model. Should we be considering that to enable children to access their rights?

Morag Driscoll: It is always difficult. Law, by its nature, tends to be complex, and the interpretation of statute is not particularly child friendly. Some improvements have been brought in through the

Children (Scotland) Act 2020, which gives children more choice about how they express a view.

We have to remember that there are different sorts of rights. Children may have passive rights such as their right to be educated. We have a duty to ensure that they are educated, but the child does not have to take any active steps in that regard, as it is up to the grown-ups to do it. Amnesty writes that the child needs to take a step to give their view, to ask to be excused from a hearing or to make the complaint in the first place.

We are asking children to participate in what is a complex and adult forum. We have made improvements, but we are not there yet. The children and young people who have come forward to the committee are not the majority, unfortunately. Many children, especially those who live with trauma or who have certain types of disability, are less likely to be aware that something has gone wrong or that they had a right to something, and they are less likely to understand their rights or the context. Their position is also very much dependent on the services that we provide. Only now—nine years after the 2011 act came into force—are we providing advocacy services for hearings.

The situation is difficult, and we need more understanding among those who provide services for adults that we need to observe children's rights. I will give an example. As well as a right to attend children's hearings, children have a duty to do so, from which they can be excused under certain circumstances. However, in my experience, it is not at all uncommon for children to have been excused without having been asked whether they wanted to go. Or they might have been excused and have said, "But I wanted to go," and an overprotective adult has told them, "No. You have been excused—you are not going." It is therefore not just a matter of giving a child a right; we must have people who are able to make that right real and enable the child to take the steps that they need to take. That is why we need such duties to be made clear in the children's rights scheme, which is the aspect that we will consider next.

However, we also want to prevent problems before they get to court. Earlier in the session, someone talked about the need for a child-friendly complaints system. In our response to the committee's call for views, we asked whether we should have a child-compatible way of doing that instead of adapting for children courts that have been designed for adults, or the other way round. Which way should we go? Too often, we try to put on such problems a bandage with a teddy bear on it, rather than ask what children actually need to enable them to exercise their rights. Also, they might already be dealing with difficult and complex situations. What should we do in the case of a child who temporarily loses capacity due to trauma?

The situation is very complex, but the bill will be a big help. I am so glad that it grants the Children and Young People's Commissioner Scotland the powers that we have discussed. However, when we talk about accessibility, I sometimes wonder whether we are coming at it from the wrong angle. We should look at what children need and how we can adapt the system to the child rather than create ways for a child to adapt to the adult system.

I am sorry to have gone on about that—it is a bit of a hobby horse of mine.

Fulton MacGregor: No—that was really useful.

Janys Scott: I should declare an interest, because my primary area of practice is family law. Over the years in which I have been in practice, I have seen a culture change, which I think we need and which is being encouraged through the bill. We have seen courts being more willing to hear from children and to have them as parties to proceedings. In recent years, I have also represented more children.

However, it is fair to say that the position across Scotland is quite patchy, as will always be the case in a cultural context. One thing that will help that hugely is the empowerment of the Children and Young People's Commissioner Scotland, who will have a big role in assisting children if they wish to participate. The bill is therefore a step in the right direction.

I would like to go back to Mary Fee's question. I have discovered where the question about tribunals came from. It is based on section 9 of the bill, and it concerns whether a children's hearing is exempt from awarding damages or whether it counts as a tribunal and therefore cannot be asked to award them. It might be worth clarifying that.

The Convener: Does Andy Sirel have anything to add in response to Fulton MacGregor's question?

Andy Sirel: I have a couple of short points to make. I endorse what Morag Driscoll and Janys Scott have said. In particular, I agree about the existence of culture change, which I, too, have seen.

More than ever, we are able to ask questions and to use existing court rules in order to make courts child friendly. Whether that is the right approach and the right lens through which to view things is a different matter, though.

Morag Driscoll asked whether we should adapt for children courts that have been designed for

adults or whether we should create something else for children. However, I am not particularly qualified to offer a view on that.

On the bill, and in this evidence session, there is a distinction between incorporation and implementation—between what should be in the bill, in order to make existing remedies more accessible, and what comes after the bill. Measures in the bill, including the time limit, the beefing up of remedies, the provisions on strikedown and making declarations of incompatibility more robust, improve the quality of the remedy.

Declarations of incompatibility, as they are defined in the Human Rights Act 1998, are not compliant with the right to an effective remedy under the European convention on human rights, as is shown, for example, in Burden v United Kingdom, from 2006. The additional requirement for ministers to report on a declaration of incompatibility is a positive step. It means that there is an imperative for something to be done. I think that the bill could perhaps go even further and say that they should do it.

We have learned hard lessons in Scotland on declarations of incompatibility. For example, a declaration of incompatibility was set down in 2007 in Smith v Scott, which was to do with prisoner voting, which reconfirmed that the decision in the Hirst v United Kingdom (No 2) case should be implemented. That was not done until this year—there was a 13-year delay on the back of a declaration of incompatibility. The bill goes some way towards making sure that that will not happen for children's rights.

The question on courts and tribunals—[*Inaudible*.]—feels like more of an implementation issue about whether we adapt what we have or create something new. That is a big piece of work on which I am not particularly qualified to offer any more insight.

Professor Tisdall: The issue that has been raised is an important area. One of the big benefits of a children's rights approach is in accountability and in the importance of having just, effective and appropriate redress and remedy. From our evidence from children and young people, we know that, largely, we are not very accessible. There are good examples that we can learn from. We know that the additional support needs tribunal is working extremely hard in that regard, and I think there is a lot of learning to be had from that.

However, I agree with Andy Sirel about the need to take a bit of a step back. On 27 November, we will be able to give our conclusions to the committee. We are having a seminar with the Children and Young People's Commissioner Scotland on the Children (Scotland) Act 2020, bringing in the children's views, to address that very issue about what redress means in that context. As has been discussed, we need to think about the package. At the very least, the baseline is that cultural change in understanding.

An increasing amount of advocacy is available for children, and we know that the Scottish Government wants to join it up. The bill is an opportunity to do so. The issue of having a child-friendly complaints system has been mentioned, but that is quite radical. In our research for the Children's Commissioner for England, even the idea of a child understanding and wanting to make a complaint was actually quite a big hurdle—[*Inaudible*.] Can we think of complaints as positive things rather than as something that a public authority, for example, might not want to hear?

Access to justice is also a big issue. You will know that we are critical of the legal aid changes, which have sometimes prevented children from accessing legal aid. It should be a requirement to address that whole area as part of the children's rights theme—through the bill, we suggest—to make sure that that cornerstone of the children's rights approach is really, and regularly, considered.

The Convener: Thank you. I know that Alexander Stewart has some questions about that, but I will first bring in Andy Sirel, who has indicated that he wishes to make a point.

11:00

Andy Sirel: I have a brief point to make off the back of what Kay said about legal aid, which is mainly for the record. I saw, from the written evidence that was submitted by the Scottish Legal Aid Board and other parties, that legal aid is under review by ministers, and I want to flag that the committee should consider whether there should be something in the bill that relates to free access to legal advice or other legal instruments, such as there is in the South African directive.

We have a problem in Scotland around eligibility criteria as they apply to children. First, there is the duty of—[*Inaudible*.]—which takes into account parental or other guardian resources, and, secondly, there are the limits themselves. I work with care-experienced people, and many of them receive the care-experienced bursary, but a part-time job makes them ineligible for legal aid. For most of the young people I work with who are in their late teens or early 20s, if they work at Nando's or Marks and Spencer and they receive the care-experienced bursary, they do not qualify for legal aid and we need to work for them pro bono. That is a serious access—[*Inaudible*.]

Fulton MacGregor: I have a brief follow-up question on an issue relating to part 2 of the bill

that witnesses have already touched on. Do you think that it goes far enough to ensure that judicial remedies that can be provided by courts and tribunals will be effective in practice for children and young people?

Convener, I am aware that some colleagues require to leave to get into Edinburgh, so I am quite happy, with your permission, to address my question to Morag Driscoll and Janys Scott QC, although anybody else can come in.

The Convener: If other panel members wish to add anything, they can request to do so in the chat box.

Morag Driscoll: That is not a simple question. It is a big improvement. The points that were made earlier about who the duties fall on and that it should not only be Scottish ministers but the Parliament are important. I go back to the question about who can raise the action, which is apart from the question of access to justice. It goes back to that question, but I do not have anything to add to what the practitioners said earlier. It is another issue to go to Janys Scott on.

Janys Scott: Part 2 of the bill allows all the tools in our current toolbox to be used on behalf of children. Unless you are going to go further and invent more tools, it is as effective as you can make it in the context of the current bill. I take Andy Sirel's point about legal aid, which certainly needs to be looked at to make sure that the bill will be effective for children. However, so far, so good.

Alex Cole-Hamilton: I will ask similar questions to those that I asked the first panel. I will start with the recognition that the UNCRC is a baseline—it is not best practice; it is what the international community regards as the bare minimum. Can we, in all conscience, incorporate the UNCRC while, for example, the age of criminal responsibility is still below the international baseline that the committee has set, albeit through a general comment? Is there a moral imperative for us to scan across all the articles to make sure that we are at the threshold, if not above it, before we can legitimately claim to have incorporated that important convention?

Morag Driscoll: Of course, the law society does not comment on moral attitudes. However, we did argue at the time that the age of criminal responsibility should have been raised to 14. Personally, I would like to see Scotland take a lead on these things, but it is much more a matter for Parliament to decide and the Law Society to recommend on. One needs to be careful.

Janys Scott: The UNCRC contains a huge and aspirational set of articles, and—as was mentioned earlier—the convention is a living instrument. Therefore, the way that it is read and interpreted will develop over time. It is important that we do not see this as a static matter but that we look at it as one that requires constant review. Huge areas of law would have to be considered, not only the age of criminal responsibility. I could run off a few examples of litigation from the past month.

If children are deprived of their liberty because they stay in children's homes that are not approved for that purpose, does that comply with article 3(3)? Does our childhood mental health service comply with what is required by articles 24 and 27, or do we have a big issue there? The Children and Young People's Commissioner Scotland's "No Safe Place" report discusses whether we are using restraint and seclusion inappropriately on children with additional support needs in Scottish schools, which relates to article 37. Are educational rights a right? What about adequate standards of living? Do we consider top-up benefits?

The area is absolutely huge, so a challenge has been set. Okay, the UNCRC contains the minimal standards, but it has to be appreciated that the issue is quite large. That is why the faculty said, "Hang on a minute—have you actually costed this out?" I do not want to discourage you—children's rights are important—but, if the bill is to have teeth, there is a lot of work to be done and quite a lot of money to be spent. Sorry.

Andy Sirel: My answer will be relatively short. The bill allows us to pull ourselves up by our bootstraps. If aspects of children's law in Scotland do not meet the minimum standards, the bill will make that happen.

How that happens is up to us. It is going to happen through the effective—[*Inaudible.*]—scheme and the impact assessments and the reporting duties. Time and space—but not too much time—and money, as Janys Scott said, will be required to bring us into compliance. Alternatively, it will happen through litigation when there are serious faults and we are below that floor. It will happen more quickly through the latter than through the former.

I do not want to put the fear into anybody. I do not think that there is a pack of opportunistic lawyers at the door who are baying for blood—that is not the case. As I said, as practitioners who work directly with children, we do not want to go directly to court. Rather than think about whether we should do this, because we might not yet meet all the requirements, we should see doing it as an opportunity to allow us to be compliant in the long run. Nevertheless, I agree with Janys Scott that it is a not insubstantial task.

I would encourage members to read COSLA's written submission, as well as the submissions from other local authorities, because those are a

good litmus test of how they view the task. Their view is that they are already doing this and that, if something is needed, it is a little bit more time. However, it is not an impossible task.

I am encouraged that there is political will and will on the ground. Nothing is impossible.

Professor Tisdall: I think that it is a moral imperative. We must incorporate the UNCRC, and the bill is an excellent start to that.

The committee might know that UNICEF commissioned research that looked at incorporation of the UNCRC in 12 countries. That work was done by our colleagues Laura Lundy and Ursula Kilkelly, and, as members might know, it found that incorporation did not substantially increase litigation. It was particularly helpful for changing culture and practice, and our discussion today has emphasised that that is what we want to do. Therefore, we have evidence to suggest that, if we invest in doing that, although litigation has to be a possibility, it is not necessarily tied to incorporation.

Alex Cole-Hamilton: Thank you. The reflection that I offer in response to Andy Sirel is that the articles of the convention are silent on the minimum age of criminal responsibility. We set it through the general comments and, under the terms of our incorporation, those general comments would not be justiciable. Therefore, I take issue with the suggestion that it will automatically happen as a result of litigation; we need to push that ourselves.

The convention is a living document that is shaped by the interpretation of optional protocols, general comments and concluding observations of UN rapporteurs. Are the witnesses content that the bill has a sufficient feedback loop built in, so that the Government is compelled to respond and adapt, based on the general comments, concluding observations and optional protocols?

The Convener: The witnesses have reflected on that somewhat in response to Mary Fee's questioning, but if they wish to add anything, we would be happy to hear that.

Alex Cole-Hamilton: That is all right; I will move on to my final question, which is on commencement. We have already touched on it lightly, with the previous panel of witnesses. An act is meaningful only when it comes into being and, at this time, there is no date for that, nor is there a date for commencement of the Age of Criminal Responsibility (Scotland) Act 2019. Can you tell us why it should be delayed? How quickly could we bring it in? Should we specify a date in the bill?

Morag Driscoll: A big piece of work will have to be done and there will be a lot of work in the background. Local authorities and other public bodies will have a lot of work to do and will be waiting for guidance, which will have to emanate from—[*Inaudible*.] I cannot see the act coming into force by Christmas but, if a date were to be included, it would have to be realistic. I agree with comments that were made earlier about a date being useful as long as it is realistic, but I also agree with the comments about bringing in the scheme. When will the first reports be due? When will we hear about that?

It is also important when doing something new with children to review it in order to see whether it is working or needs to be adapted. I would like the bill to say that the first review of the new changes must be done within a certain period. In doing something new with kids, especially in relation to a living document such as the UNCRC, you need to ask whether we are still complying, whether there have been changes and what we need to do now. I would build that into the bill. There should also be a realistic date for commencement; I would not like to see another nine years go by.

Janys Scott: Imagine sitting down with a child and telling them that they have rights under the UNCRC, but that we are sorry, because although it would be lovely to ask the court to force the public authority to do what the UNCRC says, incorporation has not happened yet and we do not know when it will happen. If we raise the expectations of children and young people with the bill, we owe it to them to say when incorporation will happen. I accept the point that there has to be a realistic timetable so that there can be preparation, but it would be a great disappointment not to set that timetable through the act being brought into force as soon as we can legally do so.

Andy Sirel: I agree with Morag Driscoll and Janys Scott. In the previous evidence session, Professor Norrie said that a date focuses minds. I am thankful that it is not my job to provide that date. I appreciate that there are considerations to balance, but a date certainly focuses minds. I do not want to be the person who delivers the bad news to a young client about the act coming in but not being enforced until they are 21 years old. That would be pretty unpleasant.

11:15

The final point that I will make about the date is that leaving it up to ministerial discretion could punt the issue into the long grass. I always worry about future proofing. We live in a very strange world. If we were to transport ourselves six years into the future and Scotland happened to be governed by a rights-sceptical party or group of persons who were not interested in the matter at all, and if the date had been left to ministerial

discretion, the provisions might never come into force. We cannot be complacent. After consultation of your colleagues in local government, I would like the bill to include a realistic date. We do not want to rush things and come out with bad procedures; we want to get this right. However, we also want incorporation to be prompt.

Professor Tisdall: I agree. There needs to be a commencement date in the bill.

To pick up on Morag Driscoll's point, I say that I think that reviewing and monitoring implementation is key. The children's rights scheme is perhaps the key place to do that. We have lots of statistics, but they are not answering our children's rights questions, so there is an urgent need to think systematically about how we do that. That would be a big step forward.

Alexander Stewart: I will stick to similar questions that I asked the witnesses in the previous session, about the children's rights scheme and children's rights and wellbeing impact assessments. The witnesses in this session have already touched on those issues. The previous witnesses identified that there are gaps, that there are opportunities to develop the scheme and the assessments, and that the language in the bill could be stronger. It would be good to know whether you believe that to be the case. Should anything be added or changed in the content of the scheme?

As we have already discussed today, the Scottish ministers would have discretion in relation to the children's rights and wellbeing impact assessments. Again, it would be good to hear your views on whether the Scottish ministers should have discretion in strategic decisions. How would that impact on the processes that have been identified throughout our evidence?

The Convener: Kay Tisdall mentioned the children's rights scheme in her previous answer, so we will go to her first.

Professor Tisdall: That is a change, but that is fine.

I believe that the committee knows that a scheme in Wales has proved to be very successful overall; we can learn from that. Such schemes can be very effective, so paying attention to the scheme in Wales makes a great deal of sense. I have slipped in those comments in case we ran out of time.

Overall, the scheme should be strengthened. Section 11(3) should include things that are required to be in the scheme—for example, a phrase about promoting understanding. I am not sure why the wording of the Children and Young People (Scotland) Act 2014, which will be repealed, has not been included, because it has been argued that that wording is stronger and is about understanding. That is perhaps a technical but important point. I have made the point that a children's redress scheme and children's rights indicators should also be included.

I have read the evidence from Together, which the committee will hear from, I believe. There is a strategic approach, and the bill uses the phrase "as they consider appropriate", so there are at least two discretionary elements. I agree with Together's suggestion that the phrase "as they consider appropriate" could be removed.

We are supportive of public authorities having to undertake children's rights and wellbeing impact assessments; in fact, we are working with some public authorities on that. That is a positive way to take forward children's rights.

Morag Driscoll: What Kay Tisdall just said is spot on. I would like the bill to be very clear. If it is to be essential and important, the language in it must be careful and clear, and there should be more obligations. The discretion element could water it down. I have nothing further to add.

The Convener: Janys—do you have anything to add on that topic?

Janys Scott: That is not an area in which the Faculty of Advocates operates, so I do not have anything useful to add.

I was interested to hear Professor Tisdall say that the Welsh scheme has been successful. It must have been a disappointment to see the case of a Welsh child being debated in the Supreme Court a couple of weeks ago. Their rights were being overlooked and the case was being defended by the Welsh Government. Such schemes have to be made effective. That was a case in which a child had been detained in unauthorised accommodation and their liberty had been taken away.

The Convener: Does Andy Sirel have any comments on the children's rights scheme or the children's rights and wellbeing impact assessment?

Andy Sirel: I have two brief comments, which have been made before. I recommend that where section 11(3) says that the scheme "may", it should say "must". I could be convinced otherwise, but I do not entirely grasp why it should be discretionary to

"ensure children are able to participate in the making of decisions that affect them",

because that is a relatively clear-cut intention of the bill.

I have a comment about section 14(3), which, similarly, is related to discretion. As a lawyer,

reading technical parts of bills that say the "Scottish Ministers must", I think, "Oh!". However, the end of section 14(3) says "as they consider appropriate", which negates the "must". That is a drafting point to do with whether the provision will be discretionary, which is a decision for the committee to make.

The children's rights scheme and CRIAs are not my area of expertise, so I cannot offer anything beyond what Kay Tisdall or other witnesses have to say. However, the future-proofing aspect is important to me. If the bill were to say that future Governments and Parliaments must do things that are in the bill, I would feel a bit safer. That is why I would turn away from the discretionary elements.

The Convener: In terms of expectation setting, we cannot bind the future too tightly, but I take on board what you are saying.

Alexander—do you have any further questions or are you content?

Alexander Stewart: I am content with the answers that I have received.

The Convener: I have a final question about the court's powers to determine compatibility, which Andy Sirel touched on in one of his answers. Part 4 of the bill sets out significant powers for courts to make declarators—a difficult word for me to say—in respect of incompatible legislation. Do you have any further comments on part 4, Andy? The committee would be particularly interested to hear whether you accept the view of the Scottish Government that strike-down powers for future primary legislation are not within the legislative competence of the Scottish Parliament?

Andy Sirel: My view on strike down is that it is a strong remedy. I like it, and I like the safeguards that are built into the bill with respect to passing notification to the Lord Advocate and the children's commissioner. That allows us to think carefully about a robust remedy and allows it to be used appropriately.

The Scottish Government's view that strike-down powers could not be applied to future legislation speaks to the issue of devolved versus reserved powers—that such provision is ultra vires, under section 29 of the Scotland Act 1998. On balance, that is right, because it is a restriction with regard to competence.

I do not know the answer to the question—I would need to apply my mind to it in more detail. It is interesting to ask whether the same problem would arise if we were to include the Scottish Parliament under section 7 of the bill. That might be tantamount to something similar—but perhaps not. When I heard that being raised in the earlier evidence session, I wondered whether that would do the same thing. It might be something for further exploration.

With regard to declarations of incompatibility, I have said already—[*Inaudible*.]—and I like the additional—[*Inaudible*.]—in place over and above the Human Rights Act 1998. I would like there to be a requirement on ministers. What they do is currently at their discretion, so I would like something more explicit in the bill. That is all I have to say. Is there a part of your question that I have not answered?

The Convener: No, you have covered it fully. Do other witnesses wish to give their opinions on that? I will bring in Janys Scott. Morag Driscoll and Kay Tisdall shook their heads, but you did not.

Janys Scott: This comes back to the point that I made at the beginning. As a litigator, I would prefer by far to go for a read down than for declarators of incompatibility, because a read-down gives the person who I am representing an immediate remedy in respect of compliant reading of the legislation, which has been very widely interpreted by the House of Lords and the Supreme Court. Therefore, section 19 is a great part of the bill. Declarators of incompatibility do not give a remedy; they just say that the law is wrong, which does not help the person who is being represented.

The compatibility point that the convener raised is a big constitutional issue. It would not be appropriate for me to express a view on that in giving evidence to a committee. It is a complex issue. I like the suggestion that ministers would be under an obligation to—[*Inaudible*.]

The Convener: I am sorry. We lost some of your answer. I wonder whether you were about to talk about the duty to report. Your sound froze after you said, "I like—". Will you repeat what you said, please?

Janys Scott: I liked Andy Sirel's point that something has to be done and that the matter cannot just be left hanging.

My final point is that there are some big constitutional issues in respect of how domestic legislation interplays with international instruments, and in the context of its being devolved legislation. Therefore, we will have some interesting work to do as and when the bill becomes law.

The Convener: Thank you. That brings our evidence session to a conclusion. I thank Morag Driscoll, Janys Scott, Andy Sirel and Professor Kay Tisdall for their evidence, which has been really helpful and valuable. If there is anything that you did not have the opportunity to say or submit to us, please feel free to provide follow-up

information. We might be back in touch through correspondence.

That concludes the public part of the meeting. The next meeting of the committee will be on Thursday 19 November, when we will continue to take evidence on the UNCRC. As we previously agreed, we now move into private session.

11:29

Meeting continued in private until 11:37.

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