

This is a pre-copyedited, author-produced version of an article accepted for publication in *European Human Rights Law Review* following peer review. The definitive published version will be available online on Westlaw UK or from Thomson Reuters DocDel service .

The Right to an Effective Remedy and Accountability in the Privatisation of Public Services:

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

Dr Katie Boyle*

Key words: incorporation, UN Convention on the Rights of the Child, economic and social rights, access to justice, pre-legislative scrutiny, effective remedies, privatisation of public services, private authorities performing public functions, devolution

Abstract

In September 2020 the Scottish Government introduced the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill to the Scottish Parliament.¹ It constitutes a watershed moment for human rights incorporation at the subnational level. Whilst manifesting as an example of innovative practice in the incorporation of rights, the Bill falls short on access to justice mechanisms to ensure effective remedies for violations, including in relation to the contested scope of accountability in the privatisation of public services. The article addresses both a domestic and international audience reflecting on the limited v transformative nature of the legalisation of rights. It recommends legislating for a right to an effective remedy and expanding the definition of a private body performing a public function to ensure accountability when public services are privatised.

Introduction

The United Kingdom (UK) signed the United Nations Convention on the Rights of the Child (UNCRC) in 1990 and ratified the treaty in 1991. Despite some limited application in the interpretation of civil and political rights,² the treaty is not binding in domestic law unless incorporated.³ This presents as an accountability gap for the state and renders the rights beyond the reach of children simply because access to remedies for violations are not available.⁴ The UK Parliament's recent decision to refuse to provide free school meals over the Christmas holiday period

* Associate Professor of International Human Rights Law, School of Law, University of Stirling, Katie.Boyle@stir.ac.uk. This research was partly funded by the Nuffield Foundation project 'Access to Justice for Social Rights: Addressing the Accountability Gap.' Dr Boyle was a member of the First Minister's Advisory Group on Human Rights Leadership, the Scottish Government's Working Group on UNCRC Incorporation and the Expert Advisory Group on UNCRC Incorporation convened by Together and the Children's Commissioner. Thank you to the anonymous reviewers for invaluable constructive feedback on an earlier draft of the article.

¹ United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill available at <https://beta.parliament.scot/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill> [Accessed 30 October 2020]

² *ZH Tanzania v SSHD* [2011] UKSC 4; *McLaughlin, Re Judicial Review (Northern Ireland) (Rev 1)* [2018] UKSC 48 (30 August 2018); *H (H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening)* [2013] 1 AC 838, *Stevens v Secretary of Communities and Local Government* [2013] JPL 1383, approved in *Collins v Secretary of State for Communities and Local Government* [2013] PTSR 1594

³ *Nyamayaro, (First) Natasha Tariro Nyamayaro and (Second) Olayinka Oluremi Ok Against The Advocate General and The Commission For Equality And Human Rights* [2019] ScotCS CSIH_29 (07 May 2019) para.79

⁴ This is the position in relation to all unincorporated treaties. K. Boyle, *Models of Incorporation and Justiciability for Economic, Social and Cultural Rights* (Edinburgh: Scottish Human Rights Commission, 2018), p.2; Together (Scottish Alliance of Children's Rights), *State of Childrens Rights in Scotland 2019 Report* (Edinburgh: Together 2019) p.110

This is a pre-copyedited, author-produced version of an article accepted for publication in *European Human Rights Law Review* following peer review. The definitive published version will be available online on Westlaw UK or from Thomson Reuters DocDel service .

provides a perfect example of how this gap in the law can manifest as a violation without a UNCRC compliant legal remedy.⁵ Several UN Committees have recommended that the UK both incorporates its international human rights obligations into domestic law as well ensures effective justiciable remedies are made available for non-compliance.⁶ The right to an effective remedy for a violation of the UNCRC forms part of the UK's legal obligations under the treaty.

The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill ('UNCRC Bill') was introduced to the Scottish Parliament in September 2020. Observing and implementing international obligations falls within the devolved competence of the Scottish Parliament.⁷ The UNCRC Bill seeks to incorporate the UNCRC into domestic law with the aim of achieving a 'maximalist approach' to incorporation. In other words, the stated policy is to ensure that 'children's rights are protected, respected and fulfilled in Scotland to the maximum extent of the Scottish Parliament's powers'.⁸ A maximalist approach means obligations materialise into genuinely transformative change and that recourse to remedies are available for a violation.

This article provides a critique of the Bill and identifies some of the key gaps emerging. Whilst manifesting as an example of innovative practice in the incorporation of rights, the Bill falls short on access to justice mechanisms to ensure effective remedies for violations, including in relation to the contested scope of accountability in the privatisation of public services. The Bill can therefore act as a beacon for progressive human rights reform domestically and at the same time provide as an international example of where accountability gaps continue to emerge in relation to effective remedies and the privatisation of public services at both the domestic and international level. This article therefore addresses both a domestic and international audience in reflecting on the limited transformative nature of the legalisation of rights.

Legal Incorporation and the Scope of the Bill

It is well documented in the literature that there are a number of vehicles through which incorporation of UNCRC can occur, including directly, indirectly and on a sectoral basis.⁹ Likewise, as Kilkelly notes, legal incorporation matters – 'children are more commonly perceived as rights-holders, within a broader context of respect for children's rights'.¹⁰ Incorporation of supranational treaties has already occurred in the UK. The model of incorporation adopted by the UNCRC Bill mirrors the models of incorporation of the European Convention of Human Rights ('ECHR') found in the Human Rights

⁵ In response to a pre-action letter threatening judicial review the Department of Education agreed to extend free school meal provision over the summer holidays, however such an approach may prove more problematic given the motion Parliament voted against a motion to continue the provision over the Christmas holidays. See Hansard, Free School Meals, 21 October 2020 Volume 68221.

⁶ Treaty bodies recommending incorporation: CEDAW/C/UK/CO/6 (CEDAW, 2009) Committee on the Elimination of Discrimination against Women; CAT/C/GBR/CO/5 (CAT, 2013) Committee against Torture; CRC/C/GBR/CO/4 (CRC, 2008) Committee on the Rights of the Child. Treaty bodies recommending justiciable enforcement and effective remedies: CRC/C/GBR/CO/5 (CRC, 2016) Committee on the Rights of the Child; E/C.12/GBR/CO/5 (CESCR, 2009) Committee on Economic, Social and Cultural Rights; E/C.12/GBR/CO/6 (CESCR, 2016) Committee on Economic, Social and Cultural Rights

⁷ Schedule 5 para.7(1)-(2) Scotland Act 1998 implementation of international obligations is an exception to the reservation of 'Foreign Affairs' to Westminster.

⁸ United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, Policy Memorandum, available at <https://beta.parliament.scot/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill> [Accessed 30 October 2020] para.7

⁹ L. Lundy et al, *UN Convention on the Rights of the Child, a Study of Legal Implementation in 12 Countries*, (UNICEF: 2012) para.1.2. See also U. Kilkelly, "The UN convention on the rights of the child: incremental and transformative approaches to legal implementation" (2019) 23 (3) *International Journal of Human Rights* 323

¹⁰ Above U. Kilkelly p.332

Act 1998 and the Scotland Act 1998 and so the provisions are familiar to the domestic constitutional lawyer.

It is a form of direct incorporation that seeks to transpose the treaty into domestic law in so far as it is possible to do so. Rather unlike examples in Norway,¹¹ Iceland¹² or Sweden¹³ (direct incorporation of the treaty through domestic legislation) or Belgium¹⁴ and Spain¹⁵ (where incorporation is automatic under the monist constitutional arrangements), the Scottish UNCRC Bill performs some peculiar and cumbersome acrobatics that seek to clarify interpretation of the ‘State Party’ under the Bill. This of course relates to the complexity of devolution in that Scotland itself is not the State Party to the Convention in international law. As highlighted by Lundy et al, this can be problematic if state obligations are seen in some way as diluted by subnational incorporation.¹⁶ Ultimately, this concern highlights that despite subnational incorporation (a positive and welcome move), the UK retains ultimate responsibility for treaty obligations, meaning the Bill does not absolve the UK of its responsibilities in Scotland. It is not clear whether this ‘reading down’ of the treaty is really necessary. The UK remains the State Party to the treaty without the need to clarify it in subnational legislation.

Nonetheless, the Bill seeks to modify the ‘UNCRC requirements’ for Scotland by requiring UNCRC reference to ‘States Parties’ to be read as a reference to a more restricted class of ‘public authority’, for reasons of legislative competence.¹⁷ The definition of a public authority (section 6 of the Bill) mirrors section 6 of the Human Rights Act 1998 as to include any person certain of whose functions are functions of a public nature, but not including an act of that person if the nature of the act is private (section 6 (4)). I will return to the contested nature of this provision later. What is important to note here is that whilst the model of incorporation could be considered ‘direct’ it is also limited in the sense that the Scottish Parliament cannot legislate in reserved areas. The Bill therefore contains a Schedule with a redacted version of the treaty outlining what is considered within devolved competence (recruitment into the armed forces, for example is redacted, whilst minimum age of employment is not).

Role of the legislature

In relation to the duties placed on the legislature there is no ‘duty to comply’ placed on the Scottish Parliament (the public authority section does not extend to SP (section 6(3)(b)). Indeed the Policy Memorandum suggests that a provision requiring future Acts of the Scottish Parliament (‘ASP’) to be compatible with UNCRC would effectively change the powers of the Parliament and is, therefore, beyond its legislative competence (para.107). This in itself is a contested position.¹⁸ Ideally, the

¹¹ The Human Rights Act 1999 in Norway was amended to incorporate the UNCRC directly in section 2.

¹² Iceland incorporates UNCRC through an Act on the Convention on the Rights of the Child No 19/2013 (Lög um samning Sameinuðu þjóðanna um réttindi barnsins). See H. Friðriksdóttir, “Protection of Children’s Rights in the Icelandic Constitution”, in Trude Haugli et al. (eds.) *Children’s Constitutional Rights in the Nordic Countries* (Brill: 2019) para.2.2

¹³ Sweden incorporated the treaty into domestic law in 2018.

¹⁴ See Lundy et al. (UNICEF: 2012) fn.9 para.4.2.1

¹⁵ Above para.4.6.1

¹⁶ Above p.102

¹⁷ Explanatory Memorandum to the Bill, available at <https://beta.parliament.scot/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill> [Accessed 30 October 2020] para.12

¹⁸ The Scottish Parliament cannot enact legislation that modifies section 29 of the Scotland Act 1998 as it is a protected enactment (Schedule 4 Scotland Act 1998). However, in providing a definition of what constitutes ‘modification’ the Supreme Court stated ‘the protected enactment has to be understood as having been in substance ‘amended, superseded, disapplied or repealed by the later one’ *The UK Withdrawal From The European Union (Legal Continuity) (Scotland) (rev 2)* [2018] UKSC 64 (13 December 2018) para.50-51. It is

This is a pre-copyedited, author-produced version of an article accepted for publication in *European Human Rights Law Review* following peer review. The definitive published version will be available online on Westlaw UK or from Thomson Reuters DocDel service .

Scottish Parliament would also be under a duty to comply with the UNCRC. Nonetheless, there are other ways the Parliament, and in particular the Equality and Human Rights Committee (EHRiC), can seek to ensure compliance with UNCRC as part of the legislative process.

There is an obligation on the Scottish Ministers to produce a statement of compatibility (section 8). This is in and of itself insufficient to constitute robust pre-legislative scrutiny. The Equality and Human Rights Committee produced a report in 2018 that sought to embed human rights compliance across the work of Parliament. The introduction of the UNCRC Bill provides the opportunity to implement and build on the recommendations of the Committee's 'Getting Rights Right' report.¹⁹ Pre-legislative scrutiny requires embedding UNCRC compliance across the work of the Scottish Parliament. It should be supported through education programmes for parliamentarians, as well as legal support for MSPs to scrutinise compliance in Committee. This form of *ex-ante* review can help support compliance with UNCRC in all future legislation.

Role of the executive

The Bill seeks to ensure compliance with UNCRC early-on in decision making through the deployment of the Children's Rights Scheme (section 11), child rights impact and wellbeing assessments, through existing reporting procedures, and by making it unlawful for public authorities to act unlawfully with UNCRC.

This will require to taking positive steps to progress children's rights. In relation to Articles 24-32 the economic and social rights protected in the treaty will require the Scottish Ministers and public authorities to ensure the following progressive²⁰ and immediate²¹ duties are met, including:

- 'take steps' to realise the rights (to have a strategy and substantive steps in place to realise rights)
- respect (refrain from interference), protect (ensure others respect), fulfil (take positive steps to realise) rights
- meet the minimum core obligation (some rights have a non-derogable core below which no child should fall)
- ensure non-discrimination in the equal enjoyment of rights (requires data gathering, disaggregation and prioritisation – how to ensure positive steps to promote rights of children with different equality characteristics)

not entirely clear whether further restricting the competence of the SP at least on a temporary basis through an ASP would be considered to be 'modification' through an amendment, or simply supplementing the protected enactment.

¹⁹ Scottish Parliament Equality and Human Rights Committee ("EHRiC"), "Getting Rights Right: Human Rights and the Scottish Parliament" (Edinburgh: Scottish Parliament, 2018), available at <https://sp-bpr-en-prod-cdn.azureedge.net/published/EHRiC/2018/11/26/Getting-Rights-Right--Human-Rights-and-the-Scottish-Parliament-3/EHRiCS052018R6Rev.pdf> [Accessed 30 October 2020]

²⁰ Progressive realisation is read into the obligations of UNCRC with reference to Article 2(1) International Covenant on Economic, Social and Cultural Rights ('ICESCR') by the UN Committee on the Rights of the Child, UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, para 7. For a discussion on this see A. Nolan, "Children's Economic and Social Rights", in U. Kil Kelly & T. Liefaard (eds.) *International Human Rights of Children* (Springer: 2019)

²¹ UN Committee on the Rights of the Child (CRC), *General comment No. 19 (2016) on public budgeting for the realization of children's rights (art. 4)*, 20 July 2016, CRC/C/GC/19, para.29. See also A. Nolan, above.

This is a pre-copyedited, author-produced version of an article accepted for publication in *European Human Rights Law Review* following peer review. The definitive published version will be available online on Westlaw UK or from Thomson Reuters DocDel service .

- deploy the maximum available resources and to budget in a way that is effective, efficient, adequate and equitable
- exercise restraint in limiting rights and avoid regression on rights protection (any derogation requires to be reasonable, proportionate, non-discriminatory, temporary, should not breach the minimum core obligation and all other potential alternatives should be considered. In the case of the UNCRC, this also requires that children’s expressed views should be considered and that, where retrogressive measures, are taken children are the last to be affected, especially children in vulnerable situations²²)
- enable access to an effective remedy if a violation occurs (as discussed below)²³

The Children’s Rights Scheme (section 11) will help the Scottish Ministers go part of the way to meet the above obligations. In its existing format the Bill requires that the Scottish Ministers ‘may’ make arrangements for the following: (a) participation of children in decisions that affect them; (b) raise awareness of and promote the rights of children; (c) consider the rights of children in the SG budget process. Each of these duties form part of the obligations under UNCRC and so form compulsory, rather than discretionary, components of UNCRC compliance (i.e. ‘may’ should be amended to ‘shall’ in section 11(3)(a)). Further, if the Bill explicitly mentions some of the obligations required to comply with the UNCRC it should be made clear that the legal duties set out in section 11(3) are not exhaustive. For example, in relation to the economic and social rights under the Bill the Scottish Ministers will require to meet all of the immediate and progressive obligations outlined above.

Role of the court

The Bill expands the means through which to enforce children’s rights in Scotland. This is a key component of a system that ensures access to justice if a violation of a right occurs. Indeed, without recourse to court the Bill would not constitute ‘incorporation’.²⁴ In other words, if recourse to court was removed then the Bill would be a form of implementation or integration of rights but would not meet the threshold required to constitute ‘incorporation’ giving legal effect to the treaty in domestic law.²⁵

The role of the court should be viewed as part of a larger statutory framework that places duties on the legislature, the executive and the judiciary to comply with the UNCRC. Whilst the court should not abdicate its role to hold public authorities to account when a violation occurs, it is also important to note that the court must be the last, and not the first resort.²⁶ In other words, the Bill should ensure the duty to comply with UNCRC is not just the responsibility of the courts but is shared between the legislature, the executive and the judiciary in a multi-institutional approach.²⁷

²² Above, A. Nolan and General Comment 19, para.32

²³ The economic and social rights in the UNCRC mirror to a certain degree the rights enshrined in ICESCR. However, as explained by A. Nolan (above), they are not an exact mirror image with the UNCRC providing more child specific ESR provisions. Understanding the UNCRC ESR duties will require drawing on international expertise to ensure interpretation is in line with treaty obligations.

²⁴ K. Boyle, *Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication* (New York: Routledge, 2020)

²⁵ L. Lundy et al. “Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review” (2013) 21(3) *International Journal of Children's Rights* 442, 444

²⁶ K. Boyle fn.24 (2020) p.7

²⁷ K. Boyle, above, p.44

This is a pre-copyedited, author-produced version of an article accepted for publication in *European Human Rights Law Review* following peer review. The definitive published version will be available online on Westlaw UK or from Thomson Reuters DocDel service .

Despite providing an array of remedies (discussed in the next section) the Bill raises a number of issues about the efficacy of access to justice for children's rights in Scotland. Recent research by Boyle and Camps highlights the importance of recognising access to justice as constituting a journey from initial advice to effective remedy as an outcome of the process.²⁸ In other words, the field of enquiry must go beyond access to a court and consider the full adjudication journey, including assessing whether the violation is addressed and the remedy is effective. In relation to the Bill there are a number of outstanding gaps to be addressed across the adjudication journey, including: access to advice, advocacy support²⁹, legal aid³⁰, prohibitive costs of judicial review³¹, alternative child-friendly administrative mechanisms³², children's participation³³, grounds and intensity of review³⁴, group proceedings³⁵ and effective remedies (see below).

Right to an effective remedy

The Policy Memorandum notes that the Bill seeks to ensure that children's rights are 'built into the fabric of decision-making in Scotland and that these rights can be enforced in the courts' (para.6). It also explains that the Bill seeks to adopt a 'maximalist' approach by ensuring that the rights are enforceable in courts and that there are 'effective remedies' for violations of the UNCRC (para.83). There is, however, no right to an effective remedy on the face of the Bill. This is a concern raised by a number of respondents to the Scottish Parliament consultation on the Bill.³⁶ When creating or expanding access to rights it is important to reflect on how rights holders can access justice should a violation of their rights occur, i.e. how can a child access his or her right if the decision maker acts unlawfully? This requires reflecting on the broader framework of redress, access to justice and access to effective remedies. As the UN Committee on the Rights of the Child stipulates, 'for rights to have meaning, effective remedies must be available to redress violations'.³⁷

The Bill does not depart drastically from existing domestic frameworks mirroring the way that the ECHR is incorporated into domestic law through the Human Rights Act 1998 ('HRA') and Scotland Act 1998 ('SA'). The Bill therefore draws on the existing statutory framework meaning there is a degree of familiarity to both the court and to those working in the legal sector. There is, however, scope to go further.

²⁸ Katie Boyle and Diana Camps, *Access to Justice for Social Rights: Addressing the Accountability Gap* (Nuffield Foundation: forthcoming)

²⁹ The Human Rights Consortium has argued for a right to independent advocacy to be recognised on the face of the Bill, <https://hrscotland.org/2020/10/28/consortium-submits-response-to-un-crc-bill-consultation/> [Accessed 30 October 2020]

³⁰ The Policy Memorandum suggests there are gaps in legal aid provision, including outdated means tested rules (para.100) and that this will be addressed in the Legal Aid Reform Bill.

³¹ 'important barriers to judicial review remain – most significantly, cost' C. McCorkindale & D. Jack, *Standing in Scots Public Law Litigation*, (Edinburgh: Human Rights Consortium Scotland, 2020), p.1

³² Together Scotland makes the case for a 'child-friendly complaints mechanism so that children's concerns can be resolved in a way that ensured full participation and respect for the child's dignity and best interests' https://www.ed.ac.uk/files/atoms/files/uncrc_incorporation_response_to_submit_16.10.20.pdf [Accessed 30 October 2020]

³³ K. Boyle, "Equality and Human Rights Committee: UNCRC (Incorporation) (Scotland) Bill, Written Evidence", 16 October 2020, para.2.6 www.stir.ac.uk/research/hub/publication/1673475 [Accessed 30 October 2020] para.3.2

³⁴ See the restrictive test of reasonableness in UK judicial review, K. Boyle, above, para.3.2

³⁵ Above para.3.2

³⁶ https://www.ed.ac.uk/files/atoms/files/uncrc_incorporation_response_to_submit_16.10.20.pdf; https://www.togetherscotland.org.uk/media/1735/crc_ehric_response_161020_final.pdf; <https://cypcs.org.uk/incorporation/evidence-uncrc-bill/> [Accessed 30 October 2020]

³⁷ General Comment 5 fn.20 para.24

This is a pre-copyedited, author-produced version of an article accepted for publication in *European Human Rights Law Review* following peer review. The definitive published version will be available online on Westlaw UK or from Thomson Reuters DocDel service .

Section 6 of the Bill makes it unlawful for public authorities to act in a way which is incompatible with the UNCRC (section 6 – mirrors s29 SA and s6 HRA). Devolved and Westminster legislation engaging with devolved areas of competence must be interpreted in so far as is possible to comply with UNCRC (section 19 – mirrors section 3 HRA/ section 101 SA). The court has the power to strike down any incompatible provision in an ASP passed before the Bill (sections 20 – mirrors ultra vires declaration under section 29 SA). The court may suspend the effect of such a strike down power to allow the incompatible provision(s) to be remedied (section 20(5) mirrors section 102 SA). Where it is not possible to interpret in a compatible way, or to strike down incompatible legislation, the court can issue a declaration of incompatibility for the ASP passed after the Bill or for Westminster legislation in areas of devolved competence (section 21 – mirrors section 4 HRA). The legislation continues to be in force until amended by legislation, or by way of Remedial Regulations (Part 6 – mirrors Schedule 2 HRA).

If the court issues a strike down or incompatibility declaratory order the Scottish Ministers must submit a report within six months of the judgment setting out what steps (if any) they intend to take (section 23). This is a new mechanism to encourage compliance post-judgment. It is particularly important in the context of declarations of incompatibility issued for a violation for the ECHR, which have been deemed insufficient to meet the threshold of an ‘effective remedy’ in ECHR jurisprudence.³⁸ In order to meet the threshold of an effective remedy there has to be a ‘long-standing and established practice’ of giving effect to the courts’ declaration of incompatibility by remedying the incompatible legislation.³⁹ The European Court of Human Rights has held that remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness.⁴⁰ The reporting procedure may therefore bring the declaration of incompatibility within the threshold of an effective remedy if the Scottish Ministers and/or Scottish Parliament establish a practice of amending incompatible legislation following a declaration. It would be preferable if this obligation was reflected on the face of the Bill. In other words, the reporting procedure (section 23) could be amended to include an obligation to take action to remedy the incompatible legislation in addition to the duty to report.

The Bill also provides that court can issue remedies that it considers to be ‘just and appropriate’ (section 8 (1)), including the award of damages (section 8(2)). Under section 8(1) there is scope for the court to deploy remedies that go beyond those explicit remedies discussed above (i.e. duty to interpret as compatible, strike down powers, delayed remedies, compliance post-judgment through reporting procedure, declarations of incompatibility). For example, the power to issue remedies that are ‘just and appropriate’ could include embracing child centric remedies that facilitate participation. However, without the obligation to ensure remedies are effective there is no guarantee that the court will seek to meet this threshold. In other words, in order to embrace the ‘maximalist’ approach and to ensure that the remedies deployed are genuinely effective it should be made explicit on the face of the Bill itself. This essentially relates to the transformative potential of the Bill. There is a risk that provisions could appear transformative on paper, but without the requirement to meet a threshold of an effective remedy for a violation there is a risk they will not be transformative in practice.⁴¹

³⁸ *Burden v UK* (App. No.13378/05), judgment of 12 December 2006.

³⁹ Above, at para.36

⁴⁰ Above, at para.36

⁴¹ See for example the constitutional protection of children’s rights in the Polish constitution. Whilst the constitution provides for transformative legal protection the judiciary have been reluctant to enforce the the full potential of the constitutional provisions, meaning the potential reach is lost and the impact is undermined. For a discussion on this see C. O’Mahony, “Constitutional Protection of Children’s Rights: Visibility, Agency and Enforceability” (2019) 19(3) *Human Rights Law Review* 401, 433 and 424 citing the UN Committee on the

The Bill does not provide a definition of what constitutes an ‘effective remedy’ nor does it compel the court to ensure the remedy deployed meets the threshold of an ‘effective remedy’. The obligation to provide an effective remedy is a key component of international and regional human rights law. It stems from Article 8 of the Universal Declaration of Human Rights that provides ‘everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.’ Article 13⁴² of the European Convention on Human Rights (ECHR) provides that ‘everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity’. Article 47 of the EU Charter of Fundamental Rights provides that ‘everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article’.⁴³ There is an established practice upon which to build: the UK courts already have experience in meeting this threshold in connection with EU law (a right and remedy that has been lost due to Brexit) and as part of the common law right to access justice.⁴⁴

The ‘Guide to good practice in respect of domestic remedies’ published by the Council of Europe in 2013, emphasises the fundamental importance of Article 13 underlying the Convention’s human rights protection system. It notes that Convention requires that a remedy ‘be such as to allow the competent domestic authorities both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.’⁴⁵ The jurisprudence of the Court has confirmed that a remedy will only be considered ‘effective’ (for the purposes of Article 13) if it is available and sufficient and it must be sufficiently certain both in theory and in practice.⁴⁶ A remedy must be effective in practice as well as in law⁴⁷, having regard to the individual circumstances of the case. Even if a single remedy does not by itself satisfy the requirements of Article 13, an aggregate of remedies may meet the threshold.⁴⁸ This approach overlaps with some of the requirements of effective remedies for economic and social rights violations, whereby a structural remedy may be more effective for multiple cases dealing with the same systemic problem (where there are multiple orders instructing different actors to address a violation).⁴⁹

Rights of the Child (CRC), *Concluding observations regarding Poland, 30 October 2002*, CRC/C/15/Add.194, para.30

⁴² Please note that although Article 13 ECHR was not incorporated into domestic law under the Human Rights Act 1998, it still forms part of the UK’s obligations under the treaty and forms part of jurisprudence regarding the UK’s obligations.

⁴³ Article 47 will no longer be enforceable domestically as the EU Charter of Fundamental Rights no longer forms part of domestic law under section 5 EU (Withdrawal) Act 2018.

⁴⁴ See the deployment of an effective remedy under Art 47 in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62; *UNISON, R (on the application of) v Lord Chancellor* [2017] UKSC 51 and *FB (Afghanistan) & Anor, R (On the Application Of) v The Secretary of State for the Home Department* [2020] EWCA Civ 1338 (21 October 2020)

⁴⁵ ‘Guide to good practice in respect of domestic remedies’, adopted by the Committee of Ministers on 18 September 2013, at 7 and 12, available at <https://edoc.coe.int/en/european-convention-on-human-rights/6608-guide-to-good-practice-in-respect-of-domestic-remedies.html> [Accessed 30 October 2020]

⁴⁶ *McFarlane v. Ireland* (App. No.31333/06), judgment of 10 September 2010, para.114; *Riccardi Pizzati v. Italy* (App. No.62361/00), Grand Chamber judgment of 29 March 2006, para.38.

⁴⁷ *El-Masri v. “the former Yugoslav Republic of Macedonia”* (App. No.39630/09), judgment of 13 December 2012, para.255; *Kudla v. Poland* (App. No.30210/96), judgment of 26 October 2000, para.152.

⁴⁸ *De Souza Ribeiro v. France* (App. No.22689/07), judgment of 13 December 2012, para.79; *Kudla v. Poland*, above, para.157

⁴⁹ D. Landau, “The Reality of Social Rights Enforcement” (2012) 53 *Harvard International Law Journal* 189

This is a pre-copyedited, author-produced version of an article accepted for publication in *European Human Rights Law Review* following peer review. The definitive published version will be available online on Westlaw UK or from Thomson Reuters DocDel service .

International human rights law requires that remedies are adequate, effective and prompt.⁵⁰ Effective remedies can include, amongst other things: restitution, compensation, rehabilitation, satisfaction, effective measures to ensure cessation of the violation and guarantees of non-repetition. Examples of specific remedies beyond compensation include: public apologies, public and administrative sanctions for wrongdoing, instructing that human rights education be undertaken, ensuring a transparent and accurate account of the violation, providing interim relief where appropriate, reviewing or disapplying incompatible laws or policies, use of delayed remedies to facilitate compliance, including rights holders as participants in development of remedies and supervising compliance post-judgment.⁵¹ This wider understanding of remedies can help address misconceptions around the role of court adjudication, in the sense that it need not necessarily be primarily about compensation for a wrong, but that reparation can also be about addressing the violation itself by ceasing the wrong and/or compelling the duty bearer to review its approach.

The right to an effective remedy forms an implicit obligation under the UNCRC⁵² and international law requires children-specific measures for appropriate redress.⁵³ Whilst the Bill and the UNCRC are silent on what constitutes an effective remedy for a violation of the treaty the Committee on the UN Convention on the Rights of the Child provides clarification. Children's special and dependent status can pose difficulties for them pursuing remedies for breaches of their rights.⁵⁴ States must therefore give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives.⁵⁵ There should be access to 'appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration'.⁵⁶ Responses to the Bill consultation process highlight the gap in child-sensitive complaints mechanisms – including, for example, children being unable to effectively participate in the judicial process, to their detriment, in decisions regarding their welfare.⁵⁷

Importantly, the obligations under the Convention must be interpreted with reference to the wider international human rights framework.⁵⁸ In its current form, the Bill does not compel decision makers or the courts to have regard to the international human rights framework when interpreting the UNCRC. This means that interpretation of the treaty domestically may fall short. In order to address this gap, section 4 of the Bill should be amended to compel courts to take into account other international human rights treaties, decisions of the UN Committee on the Rights of the Child and

⁵⁰ UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147, para.15

⁵¹ Above

⁵² The UN Committee on the Rights of the Child stipulate that 'this requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties.' General Comment 5 fn.20 para.24

⁵³ UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para.15

⁵⁴ General Comment 5 fn.20 para.24

⁵⁵ Above

⁵⁶ Above

⁵⁷ F. Morrison et al., "Response to call for views on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill" (2020), p.3

https://www.ed.ac.uk/files/atoms/files/uncrc_incorporation_response_to_submit_16.10.20.pdf [Accessed 30 October 2020]

⁵⁸ CRC General Comment 5 fn.20 para.24

This is a pre-copyedited, author-produced version of an article accepted for publication in *European Human Rights Law Review* following peer review. The definitive published version will be available online on Westlaw UK or from Thomson Reuters DocDel service .

other UN Committee decisions, General Comments under the international human rights framework as well as other comparative jurisprudence where appropriate.⁵⁹

Given that the requirement to provide effective remedies is an implicit component of the UNCRC and forms part of the Government's Policy Memorandum, section 8(1) could be amended to encourage the court to issue remedies it considers to be 'just, **effective** and appropriate'.

Alternatively, the Bill could contain an explicit 'right to an effective remedy' reflecting the examples found in Article 8 UDHR, Article 13 ECHR or the wider definition contained in Article 47 EU Charter of Fundamental Rights.

Privatisation of public services

The privatisation of public services is a significant barrier to justice in the UK. In 2019 the Special Rapporteur on Extreme Poverty raised the alarm that in the UK '*local authorities have often simply abandoned their responsibilities by relegating key services to the private sector [...] failing to take any regulatory measures to ensure basic service provision. Abandoning people to the private market in relation to services that affect every dimension of their basic well-being, without guaranteeing their access to minimum standards, is incompatible with human rights requirements*'.⁶⁰ Public services form part of state obligations under international human rights law.⁶¹ As Nolan highlights, there is a worrying lacuna in economic and social rights scholarship and practice on privatisation.⁶² In many respects, the UN Committee on the Rights of the Child has been at the forefront of addressing this gap in the international human rights sphere.⁶³

From a theoretical perspective, when states relegate key services to the private sector they must take steps to regulate that provision to ensure compliance with their human rights obligations. This type of horizontal application can be framed as a triangular relationship between the state, the providers and the recipients of the service.⁶⁴ The state (sitting at the top of the triangular hierarchy) owes duties to the recipients and may opt to fulfil those obligations via private providers under a regulatory framework. The providers then owe private obligations to the recipients through a horizontal application under the regulatory framework put in place by the state. Providers can be either private authorities or public bodies depending on how the regulatory framework is managed. The state is responsible as the primary duty bearer⁶⁵ and the operation of a triangular relationship – where private providers can also be engaged in the fulfilment of (and responsible for) duties under the regulatory framework, facilitates a better understanding of who is responsible for what at any one time.⁶⁶ The state may place obligations on other actors and afford such actors authority and responsibility to fulfil

⁵⁹ This is the type of interpretative provision found in the South African constitution section 39 (b-c). Likewise, see section 2 of the HRA.

⁶⁰ P. Alston, *Visit to the United Kingdom of Great Britain and Northern Ireland Report of the Special Rapporteur on extreme poverty and human rights*, 23 April 2019, A/HRC/41/39/Add.1, para.45

⁶¹ Policy Brief, *States' Human Rights Obligations Regarding Public Services*, (Global Initiative for Economic, Social and Cultural Rights: 2019), www.gi-escri.org/public-services-obligations [accessed 30 October 2020]

⁶² A. Nolan, "Privatization and Economic and Social Rights" (2018) 40(4) *Human Rights Quarterly* 815, 815

⁶³ A. Nolan fn.20

⁶⁴ V. Gauri & D.M. Brinks, "Introduction: the Elements of Legalization and the Triangular Shape of Social and Economic Rights", in Gauri & Brinks (eds.), *Courting Social Justice, Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: CUP, 2008) 11

⁶⁵ M. Freeman, "Conclusion: Reflections on the Theory and Practice of Economic and Social Rights", in Lanse Minkler (ed.), *The state of Economic and Social Rights* (Cambridge: CUP, 2013)

⁶⁶ V. Gauri & D.M. Brinks, fn.64 (2008), see also K. Boyle fn.24 p.6

This is a pre-copyedited, author-produced version of an article accepted for publication in *European Human Rights Law Review* following peer review. The definitive published version will be available online on Westlaw UK or from Thomson Reuters DocDel service .

its obligations. Whilst non-state actors may be held to account for failure to comply with those obligations (under a regulatory framework), the state remains responsible throughout. In other words, it cannot absolve itself of its obligations even if it has explicitly delegated that responsibility elsewhere.⁶⁷

The challenge is realising this theoretical framework in practice. The UNCRC Bill attempts to resolve this difficulty in section 6(3)(a)(iii) of the Bill whereby a public authority includes any person certain of whose functions are functions of a public nature, but not including an act of that person if the nature of the act is private (section 6 (4)). This provision mirrors section 6 HRA that seeks to ensure private bodies performing public functions have a duty to not act incompatibly with the ECHR. The Policy Memorandum further clarifies that the definition of ‘public authority’ has been applied by public bodies and the courts for over 20 years and case law has developed that the Scottish Government considers provides a ‘helpful and stable basis on which to base the definition in the Bill.’⁶⁸

Without further clarity on the face of the Bill it may not be possible to ensure that public services outsourced to private companies that provide services to children will be covered by the provision. This is because the case law has adopted a narrow, and at times arguably erroneous, definition of a private body performing a public function as constituting a ‘hybrid’ public authority for the purposes of the HRA.⁶⁹ As Palmer warns with regard to the UK approach, ‘public law obligations, in particular human rights norms, should not be sidestepped because a government has chosen to contract out duties once unambiguously assumed by the state.’⁷⁰ Likewise, the UN Committee on the Rights of the Child provides that the ‘process of privatisation of services can have a serious impact on the recognition and realisation of children’s rights.’⁷¹ The definition of the private sector, according to the Committee, includes ‘businesses, NGOs and other private associations, both for profit and not-for-profit.’⁷² In its current form, there is no guarantee those bodies will be caught by the existing definition in the Bill.

Private authorities performing public functions – a contested definition

Section 6 HRA sought to ensure that private bodies performing public functions would require to comply with the ECHR. However, in 2007 in the *YL v Birmingham*⁷³ case the House of Lords held that a private care home did not perform functions of a public nature and was not a ‘hybrid’ public authority for the purposes of the Act.⁷⁴ The UK Parliament responded by enacting section 145 of the Social Care Act 2008 to clarify that private care homes exercise a function of a public nature when providing accommodation and personal care. This is a narrow expansion of the test meaning any other service outwith the scope of residential care would be subject to the narrow test applied in *YL*. The *YL*

⁶⁷ UN Committee on the Rights of the Child (CRC), *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, 17 April 2013, CRC/C/GC/16, para.33

⁶⁸ Para.123

⁶⁹ The *Serco* case for example, excluded the provision of housing to a ‘failed asylum seeker’ meaning the private company could evict families without compliance with the ECHR. *Ali, Appeal By Shakar Omar Ali Against (1) Serco Ltd, (2) Compass Sni Ltd And (3) The Secretary Of State For The Home Department* [2019] ScotCS CSIH_54

⁷⁰ S. Palmer, “Public functions and private services: A gap in human rights protection” (2008) 6(3-4) *International Journal of Constitutional Law*, 585

⁷¹ General Comment 5 fn.20 para.42

⁷² Above

⁷³ *YL v Birmingham City Council* [2007] UKHL 27

⁷⁴ *YL* above

test has prevailed through subsequent case law (see below). Section 145 of the 2008 Act was repealed and replaced by section 73 of the Care Act 2014. In Scotland, section 73 of the 2014 Act provides that personal care in residential accommodation paid for by the local authority under sections 12, 13A, 13B and 14 of the Social Work (Scotland) Act 1968 meets the threshold of a function of a public nature and therefore engages section 6 of the HRA. This provision does not apply to children under 18 and excludes adults facing destitution subject to section 115 of the Immigration and Asylum Act 1999 (exclusion from benefits).

In subsequent case law the *YL* precedent has been reinterpreted and can be understood as constituting ‘no single test of universal application.’⁷⁵ Case law has focussed in particular on four overarching factors⁷⁶ in the determination of whether a private provider performs a public function for the purposes of section 6 HRA thus constituting a ‘hybrid’ public authority:

First, is the service publicly funded? (if yes, it may engage section 6 but does not include a commercial contract where the motivation of the service provider is to secure profit); Second, does the service relate to the performance of a statutory function? (if yes, it may engage section 6 but does not include publicly funded contracts of a private nature such as for religious or commercial purposes); Third, is the private provider taking the place of central government or local authorities in providing a public service? (if yes, it may engage section 6 but must be ‘governmental in nature’); Fourth, is the provision of the service a public service? (if yes, it may engage section 6 but does not cover services provided by ‘private schools, private hospitals, private landlords and food retailers’).⁷⁷ The *YL* precedent means that there is a focus on the motivation of the service provider in the determination of the act. Thus, in the Scottish *Ali v Serco* case the motivation of the service provider to make profit superseded the performance of the public function to provide housing in a human rights compliant way.⁷⁸ An appeal to the Supreme Court was made in the *Serco* case, however, permission for appeal was refused. The ‘motivation’ precedent has now been set. This sets a worrying precedent for interpretation of section 6 of the UNCRC (Incorporation) (Scotland) Bill.

A tentatively broader definition of the four factor approach in *YL (2007)* (drawn from *Aston Cantlow (2004)*⁷⁹ and applied in *R (Weaver) (2010)*⁸⁰), is found in the case of *TH (2016)*⁸¹ and applied in *Cornerstone (2020)*⁸². In the *TH* case the court expands the four factors to include a further two questions: fifth, to what extent is the body democratically accountable?; and sixth, would the allegations, if made against the United Kingdom, render it in breach of its international law obligations? This expanded test would provide a much broader basis through which the UNCRC could continue to apply when obligations of the state are contracted out. The leading case in Scotland did not explicitly refer to the *TH* case in the judgments of the Outer or Inner House of the Court of Session.

⁷⁵ Lord Nicholls *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v. Wallbank & Anor* [2003] UKHL 37 at para.12

⁷⁶ See *R (Weaver) v London and Quadrant Housing Trust* [2010] 1 WLR 363 para.35-38

⁷⁷ Above

⁷⁸ *Ali v Serco* [2019] CSIH 54 at para.23

⁷⁹ *Aston Cantlow* fn.75

⁸⁰ *R (Weaver)* fn.76

⁸¹ *TH v Chapter of Worcester Cathedral, Bishop of Worcester in his Corporate Capacity v Worcestershire County Council* [2016] EWHC 1117 (Admin)

⁸² *The Queen on the Application of Cornerstone (North East) Adoption and Fostering Service Ltd v The Office for Standards in Education, Children's Services and Skills* [2020] EWHC 1679 (Admin). This judgment was delivered on 7 July 2020 and there is an appeal outstanding.

In April 2019 the Outer House considered that Serco's service to provide housing to destitute asylum seekers was *'the implementation by the UK of its international obligations to provide essential services to destitute people seeking asylum'*.⁸³ The court held that the provision of housing formed a function that is 'governmental in nature' (satisfying the third factor) and that Serco therefore constituted a hybrid body under HRA. However, on appeal in November 2019 the Inner House (Scotland's highest civil court), did not consider the international obligations dimension, neither in relation to the governmental nature of the duties, nor in relation to whether the allegations would render the UK in breach of its international obligations. Instead, Lady Dorrian concluded that

*'the state cannot absolve itself of responsibility for such public law duties as the provision of accommodation to asylum seekers by delegating its responsibility to private bodies. If arrangements are made with a private company to provide accommodation, responsibility for the exercise of the public law duty is not delegated, but remains with the Home Secretary.'*⁸⁴

Whilst it is correct that responsibility remains with the state, the state has also sought to extend obligations to private actors under section 6 of the HRA. In other words, the judgment fails to acknowledge the legislative aim of regulating the private body when performing a public function. This 2019 judgment adopts a much narrower definition of the 2007 *YL* precedent than in subsequent case law, including *Cornerstone* (2020), *TH* (2016) and *LW v Sodexo* (2019).⁸⁵ In the latter of these cases the court found that the Secretary of State for Justice had failed in his duty to provide adequate or effective supervision or monitoring of strip searching of female and transgender prisoners to ensure compliance with Article 8 and Article 3 ECHR. In this case, the private contractor, *Sodexo Ltd* had already settled out of court conceding that it owed the claimants positive obligations to ensure ECHR compliant search procedures under the ECHR.⁸⁶ Thus, both the private contractor (the hybrid public authority) and the Secretary of State had obligations under the ECHR by virtue of the HRA and in relation to the latter as a state party to the treaty. This approach would have seen the *Serco* judgment acknowledge that both the Secretary of State, as well as the private provider of accommodation, were required to act in a human rights compliant way thus rendering the eviction of the asylum seekers unlawful.

By mirroring section 6 of the HRA the Bill adopts a definition of public authority that is both contested and lacking in clarity because of the oscillating positions adopted in case law in Scotland and other parts of the UK. It does not meet the 'helpful and stable basis' as per para.123 of the Policy Memorandum.

This runs contrary to the expectations of treaty implementation. Indeed, as Nolan highlights, the Committee on the Rights of the Child has taken extensive steps to set out the responsibilities of non-state actors in the provision of public services.⁸⁷ Under Article 4 of the UNCRC there is an expectation that the state implement legislative, administrative or other means to ensure regulation of the private sector. The Bill offers an opportunity to fulfil this requirement. Indeed, the Committee on the Rights of the Child has raised concerns that the implementation of UNCRC is often impeded by

⁸³ *Ali v Serco* [2019] CSOH 34 at para.31

⁸⁴ *Ali v Serco* [2019] CSIH 54

⁸⁵ *LW v Sodexo Ltd, Secretary of State for Justice* [2019] EWHC 367 (Admin)

⁸⁶ Above at para.4

⁸⁷ A. Nolan fn.20. See also UN Committee on the Rights of the Child (CRC), *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, 17 April 2013, CRC/C/GC/15, para.75-85

the inability or unwillingness of States to adopt measures under Article 4 to ensure respect for the provisions of the Convention by actors in the private sphere.⁸⁸ The Committee's view is that the state has responsibility for implementation of the treaty, and that as part of the state should ensure private services providers operate in accordance with its provisions, thus creating indirect obligations on such actors.⁸⁹ The state continues to be bound by its obligations, even when the provision of services is delegated to non-state actors.⁹⁰ State obligations include a duty to promote awareness of non-State actors' responsibilities and to ensure that all non-State actors recognize, respect and fulfil their responsibilities to the child, applying due diligence procedures where necessary.⁹¹ This means both the state (in the UNCRC Bill 'public authorities') retain responsibility for UNCRC compliance when contracting out public services, and that there is an additional obligation to ensure private service providers also comply. If public authorities outsource public services to private providers they must be prepared to regulate, monitor and supervise the provision of the services to guarantee a human rights compatible outcome.⁹² Likewise, and in respect of the obligation to deploy the maximum available resources in a manner that is efficient, effective, adequate and equitable,⁹³ it may well be that the costs of paying, monitoring and regulating the private body outweighs the costs of providing the public service directly.

The Bill offers an opportunity to adopt a clearer and broader approach to the interpretation of a 'hybrid' public authority as developed in case law in relation to the application of section 6 HRA. If the narrow definition is to prevail private bodies that enter into contracts to provide services such as housing, sheltered accommodation, immigration services, education support, provision of food/school meals, health services, provision of care/ adoption or fostering services, social security related services, among other examples, may not be required to comply under the existing narrow interpretation. This falls short of international human rights law requirements.

An alternative is to ensure that the additional 'international law obligation' factor adopted in *TH* and *Cornerstone* is included on the face of the Bill. In other words if the allegation amounts to a breach of the state's obligations under the UNCRC then the service in question can be considered to constitute a public function for the purposes of the Bill.

Finally, if a narrower definition prevails, the Bill could require that any public authority that delegates in part or in whole the provision of services under its public functions must require, as part of its contractual arrangements, that the private body provide the service to children in a UNCRC compliant way. As a bare minimum, this would result in horizontal application of UNCRC compliance. Indeed, it would ensure that public authorities take positive steps to regulate any commercial activity in the provision of services to ensure that children's rights continue to be respected. This approach is similar to the Fair Work Wales initiative that seeks to ensure public money should be provided only to organisations fulfilling the characteristics of fair work and that the focus and priorities of public sector

⁸⁸ UN Report of the Committee on the Rights of the Child, *General Assembly Official Records Fifty-ninth Session Supplement No. 41, General Thematic Discussion, A/59/41* at para.43

⁸⁹ Above at para.45.1

⁹⁰ Above

⁹¹ General Comment 15 fn.87, para.76

⁹² *LW v Sodexo* fn.85

⁹³ The obligation to deploy the maximum available resources is a sub-component of the duty to progressively realise children's economic and social rights. See K. Boyle fn.33, para.2.6

This is a pre-copyedited, author-produced version of an article accepted for publication in *European Human Rights Law Review* following peer review. The definitive published version will be available online on Westlaw UK or from Thomson Reuters DocDel service .

contracting should shift towards social value, including fair work.⁹⁴ In other words, public money used to provide services to children via private providers should ensure UNCRC compliant outcomes and should be regulated through contractual provisions/ procurement rules and through monitoring and supervision of the private body in its performance of the service.⁹⁵ The outstanding problem with this approach is that it undermines access to justice for the rights holder who is not a party to the contract (unable to enforce contractual terms) and cannot initiate judicial review proceedings against the private body (if the narrow definition of public authority prevails).

Conclusion

There is a tendency to shy away from international human rights obligations in the UK unless the rights have been directly incorporated into domestic law.⁹⁶ Indeed, as I have argued elsewhere, international human rights obligations are often misunderstood and under-utilised across the UK's legal jurisdictions.⁹⁷ The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill ('UNCRC Bill') provides an opportunity to pave the way in Scotland and beyond. It will give effect to the rights contained in the Convention in so far as it is possible to do so under the terms of devolution and goes further than any other of the UK's legal jurisdictions in doing so. It combines already existing redress mechanisms found in both the Scotland Act 1998 and the Human Rights Act 1998 to enable a variety of remedies familiar to public law. On reflection, this approach, whilst welcome and innovative in its devolved ambition, highlights some of the gaps under the existing human rights regimes across the UK.

As argued above, there is more scope to encourage UNCRC compliance from the outset through *ex ante* legislative scrutiny and human rights compliant decision-making processes. Ultimately, the court must act as a last resort should other mechanisms fail. Access to justice is therefore primary to any renewed framework that seeks to protect human rights. In the case of the UNCRC, this requires children-specific measures for appropriate redress.⁹⁸ The Bill should enable effective, child-sensitive procedures for children and their representatives.⁹⁹ Children must be able to effectively participate in the decisions that impact them, and seek redress in a system that enables their participation in both adjudication as well as remedies.

The right to an effective remedy should be explicitly recognised on the face of the Bill if the redress mechanisms are to ensure a transformative approach for children. This obligation should be understood and interpreted with reference to international human rights law through an expanded interpretation clause.

The privatisation of services continues to be a thorn in the side of human rights compliance both domestically and globally. Further clarity is needed in defining a private body performing a public

⁹⁴ Fair Work Wales, Report of the Fair Work Commission, March 2019 <https://gov.wales/sites/default/files/publications/2019-05/fair-work-wales.pdf> [Accessed 30 October 2020] para.18

⁹⁵ See *LW v Sodexo* fn.85

⁹⁶ P. Hunt, *Social Rights Are Human Rights – but the UK System is Rigged*, (London: Centre for Welfare Reform, 2017), available at <https://www.centreforwelfarereform.org/uploads/attachment/584/social-rights-arehuman-rights.pdf> [Accessed 30 October 2020]

⁹⁷ K. Boyle, "The Future of Economic, Social and Cultural Rights in Scotland: Prospects for Meaningful Enforcement" (2019) 23 *Edinburgh Law Review* 110, 110

⁹⁸ UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para.15

⁹⁹ Above

This is a pre-copyedited, author-produced version of an article accepted for publication in *European Human Rights Law Review* following peer review. The definitive published version will be available online on Westlaw UK or from Thomson Reuters DocDel service .

function to ensure accountability when public services are privatised. Ultimately if public authorities choose to outsource obligations then children's rights must prevail over the motivation of private providers.