

**UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (INCORPORATION)
(SCOTLAND) BILL**

AMENDMENTS TO BE MOVED AT STAGE 3

Section 19, page 15, line 2

leave out < (ii) an Act of Parliament >

Effect

This amendment deletes subsection (2)(a)(ii).

Reason

Section 19(1) provides that legislation which would be in the competence of the Scottish Parliament to make must be read and given effect in a way which is compatible with the UNCRC requirements.

Legislation is defined in subsection (2)(a)(i) as an Act of the Scottish Parliament and in subsection (2)(a)(ii) as an Act of Parliament.

There is no issue with the application of section 19(1) to Acts of the Scottish Parliament. There is a similar provision in section 101(2) of the Scotland Act 1998 which states that any provision of an Act of the Scottish Parliament “is to be read as narrowly as required for it to be within competence”.

However, some may argue that there could be a challenge as to whether it is competent for the Scottish Parliament to apply this interpretative rule in section 19(1) to provisions in Acts of Parliament even if those provisions would be within devolved competence. This is because Acts of Parliament are interpreted in accordance with the Interpretation Act 1978.

Furthermore, the reference to an Act of Parliament in subsection (2)(a)(ii) would apply to future as well as to past Acts of Parliament. Questions may be raised (in the future) as to whether subsection (2)(a)(ii) may be inconsistent with section 28(7) of the Scotland Act 1998 which provides that the UK Parliament has the power to make laws for Scotland and the UK Parliament might have intended that a future Act of Parliament should be incompatible with the UNCRC.

This probing amendment is intended to provide an opportunity for the Scottish Government to set out why they consider that this provision is within the competence of the Scottish Parliament.

**UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (INCORPORATION)
(SCOTLAND) BILL**

AMENDMENTS TO BE MOVED AT STAGE 3

Section 19, page 15, line 10

leave out <or Act of Parliament>

Effect

This amendment deletes the reference to an Act of Parliament from section 19(4)(a).

Reason

This amendment is consequential on the previous amendment.

**UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (INCORPORATION)
(SCOTLAND) BILL**

AMENDMENTS TO BE MOVED AT STAGE 3

Section 20, page 15, line 35

leave out <unless> and insert <even when>

Effect

This amendment ensures that the Lord Advocate is given intimation that the court is considering whether to make an order suspending the effect of a strike down declarator even when the Lord Advocate is already a party to the proceedings.

Reason

Under section 22 it is provided that where a court “is considering whether to make a strike down declarator”, intimation of that is to be given to the Lord Advocate, the Commissioner for Children and Young People in Scotland and the Scottish Commission for Human Rights (unless they are already parties to the proceedings). Those who have received such intimation, on giving notice, may take part as a party to the proceedings “so far as the proceedings relate to the making of a strike down declarator,”. Although the Lord Advocate will have received intimation under section 22(1) that the court was considering making a strike down declarator, it is conceivable that at that stage the Lord Advocate may have chosen not to be a party to the proceedings.

Where the court is satisfied that a relevant provision is incompatible with the UNCRC requirements, under section 20(2) it may make a strike down declarator. Such an order has effect from the date of the declarator (not affecting anything previously done, however), unless the court decides to make an order under section 20(5) suspending the effect of the strike down order.

In such circumstances section 20(7) requires the court, when it is considering making an order under section 20(5), to intimate that to the Lord Advocate, unless the Lord Advocate is already a party to the proceedings.

Where the Lord Advocate does receive intimation under section 20(7) the Lord Advocate may, by virtue of section 20(8), on giving notice, take part as a party to the proceedings “so far as they relate to the making of the order” - i.e., an order under subsection (5), suspending the effect of an order under subsection (2) - the strike down declarator. But if the Lord Advocate was already a party to the proceedings by virtue of the operation of section 22 that will be so only so far as the proceedings relate to the making of a strike down declarator (i.e., an order under section 20(2)).

Intimation under section 22(7) does not apply to the section 20(5) process. Accordingly, this amendment ensures that the bill provides a process for the Lord Advocate to receive intimation under section 22(7) and so become a party so far as the proceedings related to the making of an order under section 20(5).

**UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (INCORPORATION)
(SCOTLAND) BILL**

AMENDMENTS TO BE MOVED AT STAGE 3

Section 20, page 16, line 6

leave out subsection (10)(a)(ii)

Effect

This amendment deletes section 20 (10)(a)(ii).

Reason

Section 20 allows a court to strike down “relevant legislation” which is defined in section 20(10).

Section 20(10) defines “relevant legislation” as an enactment that would be within the legislative competence of the Scottish Parliament to make that comprises as per (10)(a)(i) as an Act of the Scottish Parliament and in subsection (10)(a)(ii) as an Act of Parliament which received the Royal Assent before section 20 came into force.

As confirmed in *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – a reference by the Attorney General and the Advocate General for Scotland [2018] UKSC 64* the Scottish Parliament has competence to repeal or amend UK Acts so long as otherwise within devolved competence.

It may be argued that this would also enable the Scottish Parliament to confer a power on a court to strike down or annul a past Act of Parliament which is within devolved competence. However, others may argue that conferring such a power upon a court is different because the Attorney General or Advocate General is not involved in considering whether the provision in the Act of Parliament is within devolved competence.

Furthermore, in view of the doctrine of parliamentary sovereignty, the courts are notoriously reluctant to annul a provision in an Act of Parliament.

This probing amendment is intended to provide an opportunity for the Scottish Government to explain why they consider that this provision by including reference to Acts of Parliament is within the competence of the Scottish Parliament.

**UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (INCORPORATION)
(SCOTLAND) BILL**

AMENDMENTS TO BE MOVED AT STAGE 3

Section 20, page 16, line 13

leave out <or as the case may
be) an Act of Parliament>

Effect

This amendment deletes the first reference to an Act of Parliament from section 20(12).

Reason

This amendment is consequential upon the preceding amendment.

**UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (INCORPORATION)
(SCOTLAND) BILL**

AMENDMENTS TO BE MOVED AT STAGE 3

Section 20, page 16, line 14

leave out <or as the case may
be) such an Act of Parliament>

Effect

This amendment deletes the second reference to an Act of Parliament from section 20(12).

Reason

This amendment is consequential upon the preceding amendment.

**UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (INCORPORATION)
(SCOTLAND) BILL**

AMENDMENTS TO BE MOVED AT STAGE 3

In Section 22, page 17, line 17

At end insert < () Where a court is considering whether to make a strike down declarator or an incompatibility declarator in relation to a provision of an Act of Parliament, intimation is to be given to the Advocate General for Scotland.>

Effect

This amendment ensures that when a court is considering making a declarator striking down, or an incompatibility declarator in relation to a provision of an Act of Parliament within devolved competence that must be intimated to the Advocate General for Scotland.

Reason

Section 22(1) provides for the Lord Advocate, the Commissioner for Children and Young people and the Scottish Commission for Human Rights to be given intimation (for the purposes of facilitating an intervention in the case) when a court is considering whether to make a strike down or incompatibility declarator in connection with a provision of an Act of the Scottish Parliament or an Act of Parliament within devolved competence.

We agree with the policy behind Section 22. However, when the court is considering these declarators in respect of an Act of Parliament, we believe that there is a good case for such potential action by the court to also be intimated to the Advocate General.

This is because there may well be an argument as to whether the provision of the Act of Parliament in question is within devolved competence. In addition, a strike-down or incompatibility declarator in relation to such a provision would entail a court declaring that the UK Parliament had placed the UK in breach of its international law obligations under the Convention, and the consequently UK Government would have a valid interest should that be the case.

Accordingly, we consider that such an intimation and the following power to intervene in the case should be provided to the Advocate General.

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AMENDMENTS TO BE MOVED AT STAGE 3

Section 22, page 17, line 20

at end insert < () If the Advocate General is given notice under subsection () the Advocate General may, on giving notice, take part as a party to the proceedings so far as the proceedings relate to the making of a strike down declarator or declarator of incompatibility in relation to a provision of an Act of Parliament>

Effect

This amendment provides the Advocate General with the power to take part in the proceedings relating to the strike down or declaration of incompatibility in relation to a provision of an Act of Parliament.

Reason

This amendment is consequential upon the preceding amendment.

**UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (INCORPORATION)
(SCOTLAND) BILL**

AMENDMENTS TO BE MOVED AT STAGE 3

Section 29, page 21, line 2

after <Advocate> insert < or
Advocate General for Scotland>

Effect

This amendment ensures that the Advocate General for Scotland can require a court to refer to the Supreme Court any compatibility question which has arisen in proceedings where the Advocate General is a party.

Reason

If previous amendments are successful in terms of enabling the Advocate General to be a party to proceedings it follows that the Advocate General should be given the same power to direct references to the Supreme Court in relation to compatibility questions. This power would only relate to cases involving the compatibility of Acts of Parliament.

**UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (INCORPORATION)
(SCOTLAND) BILL**

AMENDMENTS TO BE MOVED AT STAGE 3

Section 29, page 21, line 4

after <Advocate> insert < or
Advocate General>

Effect

This amendment is consequential upon the preceding amendment.

**UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (INCORPORATION)
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AMENDMENTS TO BE MOVED AT STAGE 3

Section 30, page 21, line 8 at end insert < If the compatibility question referred to the Supreme Court under subsection (1) is in relation to a provision of an Act of Parliament, the Lord Advocate must intimate the making of the reference to the Advocate General for Scotland who may take part in the proceedings before the Supreme Court.>

Effect

This amendment ensures that if the Lord Advocate makes a reference to the Supreme Court about a compatibility question concerning a provision in an Act of Parliament the Lord Advocate must intimate the reference to the Advocate General for Scotland.

Reason

We believe that in the circumstances set out in section 30(1) if the compatibility question referred to the Supreme Court concerns provisions of an Act of Parliament the Lord Advocate must intimate the reference to the Advocate General. This requirement would only relate to cases involving the compatibility of Acts of Parliament.