

## **ACCESS TO JUSTICE FOR CHILDREN: SCOTLAND (UK)**

*This report was produced by White & Case LLP in January 2015 but may have been subsequently edited by Child Rights International Network (CRIN). CRIN takes full responsibility for any errors or inaccuracies in the report.*

### **I. What is the legal status of the Convention on the Rights of the Child (CRC)?**

#### **A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?**

Scotland is one of four countries that form the United Kingdom of Great Britain and Northern Ireland (“UK”). It retains a separate legal system. Under the Scotland Act 1998,<sup>1</sup> the Scottish Parliament has legislative competence to “observe and implement international obligations”;<sup>2</sup> however, the Act also lists “reserved matters” over which the UK Government retains exclusive legislative power, including asylum, immigration and social security/welfare.

The UK ratified the CRC on 16 December 1991. Ratified international instruments do not, however, have automatic force of law in the UK, unless incorporated through legislation. At present, no direct legislation has been enacted to give the CRC direct force of law.

The Scottish Government has stated that the retention of control by the UK Government over the reserved matters “limits the extent to which the Scottish Government and Scottish Parliament can give effect to the [CRC].”<sup>3</sup>

#### **B. Does the CRC take precedence over national law?**

The CRC does not take precedence over national law in Scotland, although where national law is unclear, it will be interpreted in line with the Convention and other international human rights treaty.<sup>4</sup>

#### **C. Has the CRC been incorporated into national law?**

The CRC has not been fully incorporated into Scots Law. Some of the provisions of the Convention are reflected in national law. For example, a

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<sup>1</sup> Scotland Act 1998, available at: <http://www.legislation.gov.uk/ukpga/1998/46/contents>.

<sup>2</sup> Scotland Act 1998, Schedule 5.

<sup>3</sup> The Scottish Government, Scottish Government Submission to The 5th UK Government Report to the UN Committee on the Rights of the Child, June 2013, available at: <http://www.scotland.gov.uk/Resource/0042/00426765.pdf>.

<sup>4</sup> Submission from Professor Elaine E Sutherland to the Education and Culture Committee of the Scottish Parliament regarding the Children and Young People (Scotland) Bill, at para. 27, available at: [http://www.scottish.parliament.uk/S4\\_EducationandCultureCommittee/Children%20and%20Young%20People%20\(Scotland\)%20Bill/Elaine\\_E.\\_Sutherland.pdf](http://www.scottish.parliament.uk/S4_EducationandCultureCommittee/Children%20and%20Young%20People%20(Scotland)%20Bill/Elaine_E._Sutherland.pdf).

provision similar to the CRC's best interests principle can be found in the Children (Scotland) Act 1995,<sup>5</sup> which requires that paramount importance is attached to the welfare of the child in all matters regulated by that Act. Nonetheless, progress has been described as inconsistent.<sup>6</sup>

The Children and Young People (Scotland) Act 2014 created specific duties on Ministers to consider ways in which the CRC can be further taken forward in Scotland and, if appropriate to take steps regarding that consideration.<sup>7</sup> In addition, it also places a duty on specific public bodies to report within a three-year period on what they have done to further children's rights,<sup>8</sup> the first report being due in 2018.

D. Can the CRC be directly enforced in the courts?

The CRC cannot be directly enforced in the courts due to not being incorporated into domestic law.

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

The Convention is frequently referenced and discussed as a source of interpretive guidance. Examples of cases citing the CRC include: *BJ v. Pauline Proudfoot, Children's Reporter for Stirling and The Lord Advocate* (2010),<sup>9</sup> *BH v. Lord Advocate* (2011),<sup>10</sup> and *Procurator Fiscal v. Watson & Anor* (2002).<sup>11</sup>

## II. What is the legal status of the child?

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

Children can initiate cases in the courts, provided they are deemed legally capable to do so - please see part II.B. If not, the case will have to be brought on behalf of the child by a parent or guardian - please see part II.C.

B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the

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<sup>5</sup> Children (Scotland) Act 1995, Section 16(1), available at: <http://www.legislation.gov.uk/ukpga/1995/36/contents>. See also Children's Hearings (Scotland) Act 2011, Section 25, available at: <http://www.legislation.gov.uk/asp/2011/1/section/25>.

<sup>6</sup> Laura Lundy, Ursula Kilkelly, Bronagh Byrne and Jason Kang, The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries, at p. 121, available at: [http://www.unicef.org.uk/Documents/Publications/UNICEFUK\\_2012CRCImplementationReport.pdf](http://www.unicef.org.uk/Documents/Publications/UNICEFUK_2012CRCImplementationReport.pdf).

<sup>7</sup> Children and Young People (Scotland) Act 2014, Section 1(1), available at: <http://www.legislation.gov.uk/asp/2014/8/contents/enacted>.

<sup>8</sup> Children and Young People (Scotland) Act 2014, Section 2.

<sup>9</sup> Available at: <https://www.crin.org/en/library/legal-database/bj-v-pauline-proudfoot-childrens-reporter-stirling-and-lord-advocate>.

<sup>10</sup> Available at: <https://www.crin.org/en/library/legal-database/bh-v-lord-advocate>.

<sup>11</sup> Available at: <https://www.crin.org/en/library/legal-database/procurator-fiscal-v-watson-anor>.

assistance of a representative?

In Scotland, anyone over the age of 16 has full legal capacity.<sup>12</sup> Children under that age are competent to instruct a solicitor and to sue, or to defend, in any civil proceedings, if they have “a general understanding of what it means to do so”, which is legally presumed for children over the age of 12.<sup>13</sup>

The Children (Scotland) Act 1995 expressly confers on the parent the responsibility<sup>14</sup> and the right<sup>15</sup> to act as the child’s legal representative, with “child” for these purposes meaning a person under the age of 16 years.<sup>16</sup> However, this does not prevent a child from bringing a case independently of the parent or guardian, should the court judge the child to have sufficient understanding.<sup>17</sup>

C. In the case of infants and young children, how would cases typically be brought?

In cases relating to infants and young children, the child’s parent or legal guardian will typically initiate a lawsuit on behalf of the child as a litigation friend.<sup>18</sup>

D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

Legal aid is available to children in Scotland in certain situations. *Civil legal aid* for advice and assistance is potentially available at all stages of a case and, if obtained, will help pay for advice from a solicitor. Legal aid may also be available once a case has progressed to court, and will assist with covering fees a solicitor charges at this stage.<sup>19</sup> Eligibility is determined on financial grounds, but a contribution may still need to be paid towards the cost of the case.<sup>20</sup> When a child is applying for legal aid, the financial resources of their parents will be taken into account unless that would be unjust or inequitable.<sup>21</sup> A special form of legal assistance from the Scottish Legal Aid Board for children, or for adults involved in the upbringing of a child, referred to as Children’s Legal Assistance, is available to cover court hearings that are connected to children’s hearings, as explained in part IV.B below.

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<sup>12</sup> Age of Legal Capacity (Scotland) Act 1991, s.1(1)(b), available at: <http://www.legislation.gov.uk/ukpga/1991/50/contents>.

<sup>13</sup> Age of Legal Capacity (Scotland) Act 1991, s. 2(4A)-(4B).

<sup>14</sup> Children (Scotland) Act 1995, Section 1(1)(d).

<sup>15</sup> Children (Scotland) Act 1995, Section 2(1)(d).

<sup>16</sup> Children (Scotland) Act 1995, Sections 1(2)(a) and 2(7).

<sup>17</sup> Children (Scotland) Act 1995, Section 1(3). For further information, please see the Scottish Government website, available at: <http://www.scotland.gov.uk/Publications/2003/01/16151/16391>.

<sup>18</sup> Children (Scotland) Act 1995, Section 1(1)(d).

<sup>19</sup> <http://www.slab.org.uk/public/civil/info/>.

<sup>20</sup> <http://www.slab.org.uk/public/civil/eligibility/>; For further information, see [http://www.slab.org.uk/common/documents/publications/leaflets/Info\\_for\\_Applicants\\_08\\_Jul\\_14\\_Web.pdf](http://www.slab.org.uk/common/documents/publications/leaflets/Info_for_Applicants_08_Jul_14_Web.pdf).

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[http://www.adviceguide.org.uk/scotland/law\\_s/law\\_legal\\_system\\_s/law\\_taking\\_legal\\_action\\_s/help\\_with\\_legal\\_costs\\_scotland.htm](http://www.adviceguide.org.uk/scotland/law_s/law_legal_system_s/law_taking_legal_action_s/help_with_legal_costs_scotland.htm).

Whether *criminal legal aid* will be available may depend on the seriousness of the charges faced, whether the individual is in custody, and whether the individual plans to plead guilty or not.<sup>22</sup> Such legal aid will be completely free, although advice received before the legal aid was granted may still have to be paid for.

Legal advice and assistance may be granted for *judicial review cases*, but, as the Scottish Legal Aid Board cannot pay for work that is not “necessarily and reasonably undertaken,” applicants may find this a difficult test to pass. It must be established that the person seeking judicial review has exhausted all other remedies open to them.<sup>23</sup>

Finally, children’s legal assistance is available in relation to *children’s hearings* if it is determined that a lawyer is needed but the party does not have the means to pay for the legal services.<sup>24</sup>

- E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child’s parents or guardian have to agree to a case being brought)?

No further conditions or limitations were identified.

### III. How can children’s rights violations be challenged before national courts?

- A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

Legal proceedings in civil courts follow the Scots Acts of Sederunt, which contain the procedural rules for the civil courts in Scotland;<sup>25</sup> the main Acts of Sederunt which will be relevant are the Sheriff Court Civil Procedure Rules<sup>26</sup> and the Court of Session Rules.<sup>27</sup>

Criminal matters arising from violations of children’s rights will usually be prosecuted by the Crown Office & Procurator Fiscal Service (COPFS), nominally by the Lord Advocate.<sup>28</sup> If the COPFS does not bring a criminal case against the suspect, the victim(s) may have the right to bring a private criminal prosecution; however, these must be sanctioned by the High Court and are extremely rare.

Actions for judicial review of all actions of governmental and private bodies in Scotland are heard by the Court of Session.<sup>29</sup> Unlike in England and

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<sup>22</sup> <http://www.slab.org.uk/public/criminal/info/>.

<sup>23</sup> [http://www.slab.org.uk/providers/mailshots/newsfeed/Judicial\\_review](http://www.slab.org.uk/providers/mailshots/newsfeed/Judicial_review).

<sup>24</sup> <http://www.slab.org.uk/public/childrens/>.

<sup>25</sup> <https://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/new-rules>.

<sup>26</sup> <https://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/sheriff-court---civil-procedure-rules>.

<sup>27</sup> <https://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/court-of-session-rules>.

<sup>28</sup> For further information, see <http://www.copfs.gov.uk/about-us/who-we-are>.

<sup>29</sup> Court of Session Rules, Chapter 58.

Wales, judicial review in Scotland is not limited to cases which have an element of public law; Lord Hope in *West v Secretary of State for Scotland* stated that “the competency of the application does not depend upon any distinction between public law and private law, nor is it confined to those cases which English law has accepted as amenable to judicial review... Judicial review is available...to ensure that the decision-maker does not exceed or abuse his powers or fail to perform the duty which has been delegated or entrusted to him”.<sup>30</sup>

The children’s hearings system provides support for all children under 16 in Scotland who may need some form of compulsory intervention and in certain circumstances to those under 18.<sup>31</sup> Proceedings in the children’s hearings system will begin with a child being referred to a Children’s Reporter, usually by the police, a social worker or an education worker, because some aspect of the child’s life is giving cause for concern. Children and young people can also refer themselves, or be referred by any other member of the public. Once a referral has been made, the Children’s Reporter will decide whether the child needs to be referred to a children’s hearing, and, if so, will arrange a hearing for the child.<sup>32</sup>

The Equality and Human Rights Commission in Scotland is empowered to instigate proceedings in its own name where there have been breaches of the Human Rights Act.<sup>33</sup> The Commission is able to initiate judicial review proceedings without having to fulfill the “victim” requirement, and it is also able to intervene in human rights and equality cases instigated by others, particularly at appellate level (including in the European Court of Human Rights). Notably, the Equality and Human Rights Commission has intervened, among others, in cases relating to parents locking disabled offspring in bedrooms,<sup>34</sup> the clinical assessments of a foster child,<sup>35</sup> and discrimination in the provision of support and services by local authorities to children in the travelling community.<sup>36</sup> In *R v. TN* where the Commission appealed on the conviction of child trafficking victims, with submissions focusing on the importance of the best interests of the child.<sup>37</sup> The Commission shares its remit with the Scottish Human Rights Commission

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<sup>30</sup> *West v Secretary of State for Scotland* [1992] SC 385, at 413, available at: .

[http://www.bailii.org/scot/cases/ScotCS/1992/1992\\_SC\\_385.html](http://www.bailii.org/scot/cases/ScotCS/1992/1992_SC_385.html).

<sup>31</sup> For example, 16 and 17-year-old children under compulsory supervision are covered, as well as children coming into the system at 15 but for whom decisions aren’t made until they are 16.

<sup>32</sup> Children’s Hearing (Scotland) Act 2011, available at:

<http://www.legislation.gov.uk/asp/2011/1/contents>; see also:

<http://www.chscotland.gov.uk/the-childrens-hearings-system/how-does-the-childrens-hearings-system-work/>.

<sup>33</sup> <http://www.equalityhumanrights.com/legal-and-policy/our-legal-work/strategic-litigation>.

<sup>34</sup> *A Local Authority v A (A Child) & Anor* [2010] EWHC 978 (COP) (04 May 2010), available at:

<http://www.familylawweek.co.uk/site.aspx?i=ed120606>.

<sup>35</sup> *MG, R (on the application of) v Equality and Human Rights Commission* [2008] EWHC 1577, available at: [www.bailii.org/ew/cases/EWHC/Admin/2008/1577.html](http://www.bailii.org/ew/cases/EWHC/Admin/2008/1577.html).

<sup>36</sup> *J v Worcestershire County Council* [2013] EWHC 3845 (Admin), available at:

<http://www.bailii.org/ew/cases/EWHC/Admin/2013/3845.html>.

<sup>37</sup>

<http://www.equalityhumanrights.com/sites/default/files/uploads/legalpowers/Domestic%20Interventions-%20November%202014.doc>.

and is bound to discuss issues raised with that body before taking action.<sup>38</sup>

The Scottish Commission for Human Rights was established in 2006 with the aim of promoting understanding and respect for human rights. An independent Commissioner for Children and Young People was set up through the Commissioner for Children and Young People (Scotland) Act 2003,<sup>39</sup> following the establishment of such role in Wales and Northern Ireland. The purpose of the role is to promote awareness and understanding of the rights of children, review laws and policies relating to the rights of children, and to commission and oversee research on matters relating to child rights, among other responsibilities.

The European Court of Human Rights decides cases concerning alleged violations of any of the rights contained in the European Convention on Human Rights.<sup>40</sup> Any individual, group of individuals or an NGO who is a victim of a violation of one of these rights may submit a complaint to the Court,<sup>41</sup> but the complaint will be admissible only if all domestic remedies have been exhausted.<sup>42</sup> Anonymous complaints are not permitted.<sup>43</sup> The procedural rules for the Court do not make any child-specific provisions. Persons may initially present an application themselves or through a representative, however, all applicants must be represented at hearings thereafter.<sup>44</sup> After examining the case, the Court renders a judgment which is binding on the State<sup>45</sup> and also has powers to award monetary compensation to the victims of human rights abuses.<sup>46</sup> It is also worth noting that the Court has an established practice of referring to other international human rights instruments, including the CRC, as guides to interpretation of the European Convention.

#### B. What powers would courts have to review these violations, and what remedies could they offer?

The civil remedies available in Scotland are varied, and depend on the details of the case. The most common civil remedies include damages, payments, specific implement (an order to do something, other than pay money, which was agreed in a contract) and interdict (an order to stop something being done or planned to be done).<sup>47</sup>

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<sup>38</sup> <http://www.equalityhumanrights.com/legal-and-policy/commission/legal-powers>.

<sup>39</sup> Available at: <http://www.legislation.gov.uk/asp/2003/17/contents>.

<sup>40</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights”), 1950, Articles 19 and 32, available at: <https://www.crin.org/en/library/legal-database/european-convention-protection-human-rights-and-fundamental-freedoms>.

<sup>41</sup> Ibid., Article 34.

<sup>42</sup> Ibid., Article 35.

<sup>43</sup> Ibid.

<sup>44</sup> Rules of Court, July 2014, Rule 36, available at: [http://www.echr.coe.int/documents/rules\\_court\\_eng.pdf](http://www.echr.coe.int/documents/rules_court_eng.pdf).

<sup>45</sup> European Convention on Human Rights, Article 46.

<sup>46</sup> Ibid., Article 41.

<sup>47</sup> Scottish Parliament Information Centre (SPICe) Briefing, The Scottish Civil Court System, p. 7, available at: <http://www.scottish.parliament.uk/Research%20briefings%20and%20fact%20sheets/SB09-52.pdf>.

There are a number of criminal sentences which may be available in cases where violations of children's rights have taken place; the type of sentence available will depend on the type and severity of the crime committed. The type of sentence will be decided by the Justice of the Peace, Magistrate, Sheriff, or Judge (as appropriate).<sup>48</sup>

The process of judicial review in Scotland is governed by Chapter 58 of the Rules of Court. The most common type of remedy in judicial review proceedings is a "quashing order" which overturns an unlawful decision and obliges the public body to reconsider its decision, this time bearing the court's ruling in mind.<sup>49</sup> However, these orders are not directly enforceable and do not actually require the public body to reach a different verdict; it may ultimately not alter its stance. The court may also issue an injunction or an interdict.<sup>50</sup>

For cases handled in the children's hearings system, the remedies available will usually be a compulsory supervision order, an interim compulsory supervision order, a medical examination order, or a Warrant to Secure Attendance.<sup>51</sup>

In cases involving violations of the Human Rights Act, or where a rule of law or statutory provision is found to be incompatible with the European Convention on Human Rights, the Scottish courts may issue a "declaration of incompatibility" but that order does not affect the validity of legislation.<sup>52</sup> A civil remedy (usually damages) may be available based on the non-compatibility.<sup>53</sup> However, it must be noted an Act of the Scottish Parliament is not law if it is incompatible with the ECHR,<sup>54</sup> meaning that courts may reduce (i.e. quash) such Scottish legislation.

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

Generally, identification of the individuals involved is a feature of civil proceedings in Scotland. However, courts have the power to order that a name or other detail likely to lead to identification of an individual be withheld from the public, e.g. by prohibiting publication of that name or matter.<sup>55</sup> They may also direct that newspaper reports of civil proceedings involving children must not reveal the name or other particulars calculated to lead to identification of a person under the age of 17 who is concerned in the proceedings; pictures of such persons must also not be published in

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<http://www.victimsofcrimeinscotland.org.uk/the-justice-process/court-process/court-sentencing-powers/>.

<sup>49</sup> Court of Session Rules, rule 58.4.

<sup>50</sup> <http://www.equalityhumanrights.com/legal-and-policy/commission/legal-powers>.

<sup>51</sup> For further information, see Children's Hearings (Scotland) Act 2011.

<sup>52</sup> Human Rights Act 1998, Section 4.

<sup>53</sup> Human Rights Act 1998, Section 8.

<sup>54</sup> Scotland Act 1998, Section 29(2)(d).

<sup>55</sup> Contempt of Court Act 1981, Section 11, available at:

<http://www.scotland.gov.uk/resource/0041/00416261.pdf>.

newspapers<sup>56</sup> (however, there has been some debate about whether this reference to “newspapers” covers online newspapers or social media).<sup>57</sup> Similarly, it is an offence to publish any matter likely to identify a child concerned in proceedings at a children’s hearing.<sup>58</sup> Journalists may also be excluded from a children’s hearing.<sup>59</sup>

Similar rules to those in civil cases exist regarding identification of young persons in criminal cases in Scotland. It is an offence to publish any matter that would cause identification of a person under the age of 17 who is concerned in the proceedings. However, where a person under the age of 16 is concerned as a witness only and no one against whom proceedings are being taken is under the age of 16, the requirements will not apply unless the court expressly directs so.<sup>60</sup>

Judicial review proceedings in Scotland do not require the identification of specific child victims. An action for judicial review can be brought by anyone with a “sufficient interest” in the issues raised in the proceedings.<sup>61</sup>

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

Scots law does not currently allow for multi-party action procedures. Cases raising similar issues to other cases may be suspended temporarily pending the outcome of the earlier similar case.

E. Are non-governmental organisations permitted to file challenges to potential children’s rights violations or to intervene in cases that have already been filed?

Non-governmental organisations (“NGOs”) are able to bring judicial review proceedings in their own name where they have a “sufficient interest” in the proceedings.<sup>62</sup> However, it may be difficult for NGOs to satisfy that requirement.<sup>63</sup> Non-governmental organisations may also apply for

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<sup>56</sup> Children and Young Persons (Scotland) Act 1937, Section 46(1), available at:

<http://www.legislation.gov.uk/ukpga/Edw8and1Geo6/1/37/section/46>.

<sup>57</sup> <http://www.scotland.gov.uk/resource/0041/00416261.pdf>.

<sup>58</sup> Children’s Hearings (Scotland) Act 2011, Section 182. See also:

<http://www.chscotland.gov.uk/media/29616/media-briefing-sheet-for-journalists-digital-version.pdf>.

<sup>59</sup> Children’s Hearings (Scotland) Act 2011, Section 78.

<sup>60</sup> Criminal Procedure (Scotland) Act 1995, Section 47, available at

<http://www.legislation.gov.uk/ukpga/1995/46/section/47>. See also

<http://www.scotland.gov.uk/resource/0041/00416261.pdf>.

<sup>61</sup> *Axa General Insurance Company Ltd and Others v The Lord Advocate and Others* 2012 SC (UKSC) 122, available at: [https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2011\\_0108\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2011_0108_Judgment.pdf).

<sup>62</sup> See the Scottish Government’s consultation paper on the Courts Reform (Scotland) Bill, available at <http://www.scotland.gov.uk/Publications/2013/02/5302/2>; in particular, Chapter 5, on “Improving judicial review procedure in the Court of Session”, which refers to the discussion of “sufficient interest” and standing in the judgment in *Axa v Lord Advocate and others* (2013), available at:

[https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2011\\_0108\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2011_0108_Judgment.pdf).

<sup>63</sup> See, e.g., the May 2013 Friends of the Earth Scotland response to the Scottish Government consultation on the Courts Reform (Scotland) Bill, at p. 4, available here:

<http://www.scotland.gov.uk/Resource/0042/00425378.pdf>, in which it was argued that “while the new test [in Scots law] of sufficient interest should serve to improve access to justice in...public interest cases...the Scottish courts have not been quick to apply it.”



permission to participate in a judicial review proceeding by, for instance, providing evidence.<sup>64</sup>

NGOs are also able to seek to intervene in civil and criminal matters in which they have a strong interest, although there are no clear rules governing these kinds of interventions, and permission to intervene (if sought) will be at the discretion of the court.

**IV. Practical considerations.** Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children's rights, such as:

A. Venue. In what courts could a case be filed (e.g. civil, criminal, administrative, etc.)? What would the initial filing process entail?

Civil matters will usually be filed with the Sheriff Courts at first instance. Claims having a value of over £5000 follow the ordinary cause procedure;<sup>65</sup> claims of value between £3000 and £5000 - the summary cause procedure;<sup>66</sup> and claims of up to £3000 are dealt with using the small claim procedure.<sup>67</sup>

The children's hearings system deals with the majority of cases where there are allegations of criminal conduct involving persons under the age of 16 in Scotland. However, criminal cases against children can be dealt with in the usual criminal courts if deemed by the local procurator fiscal (public prosecutor) to be serious enough. These may be brought to the Sheriff Courts initially. The High Court of Justiciary is Scotland's supreme criminal court, and hears the most serious criminal cases at first instance.<sup>68</sup> The minimum age of criminal responsibility in Scotland is 12 years old.<sup>69</sup> Most cases concerning the commission of a crime by a child between the ages of 12 and 16 and all cases where the child is under the age of 12 are dealt with in the children's hearings system.

Applications for judicial review should be filed with the Court of Session, and made in line with the provisions of Chapter 58 of the Court Rules.

B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

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<sup>64</sup> R v. TN (Criminal Court of Appeal) (2014). See <http://www.equalityhumanrights.com/commission-tells-court-appeal-child-trafficking-victim-should-not-be-prosecuted>.

<sup>65</sup> <http://www.scotcourts.gov.uk/taking-action/ordinary-cause>.

<sup>66</sup> <http://www.scotcourts.gov.uk/taking-action/summary-cause>.

<sup>67</sup> <http://www.scotcourts.gov.uk/taking-action/small-claims>.

<sup>68</sup> <http://www.scotland-judiciary.org.uk/16/0/Court-Structure>.

<sup>69</sup> Criminal Procedure (Scotland) Act 1995, Section 41A, available at: <http://www.legislation.gov.uk/ukpga/1995/46/section/41A>.

Children’s Legal Assistance is potentially available to any child, or to adults involved in the upbringing of a child, in relation to a children’s hearing or court hearings connected to children’s hearings. Children’s Legal Assistance enables the child to receive advice from a lawyer before and after the hearing, and in certain cases will allow a lawyer to attend the court to represent the child. However, it does not cover criminal or civil matters.

Children can apply for legal aid directly themselves so long as they are able to show that they understands what it means to ask a solicitor to act on their behalf. Parents or carers may also apply for legal aid on the child’s behalf. A “safeguarder” may also apply for the child—this will be a person appointed by the children’s hearing or sheriff to look after the child’s interests.<sup>70</sup>

To benefit from the Children’s Legal Assistance fund, in most cases applicants will need to pass certain tests to check they are unable to pay for a lawyer themselves, but the specific tests differ depending on the nature of the case and what stage it has already reached. Potential applicants can check their eligibility on the Scottish Legal Aid Board website.<sup>71</sup> If children’s legal aid is received through the Scottish Legal Aid Board, all legal costs will be covered, including solicitor/advocate fees and other expenses such as for expert witnesses.<sup>72</sup>

In children’s hearings, legal aid is available for a child or young person automatically in certain situations, namely where the panel members are considering a secure accommodation, where a sheriff is considering whether to vary or recall a child protection order, where a children’s hearing is to be held after a child protection order is granted by the sheriff, or where a hearing is arranged after the child or young person is kept in custody by the police.<sup>73</sup>

There may be times when civil legal aid is not provided for free. The child or the child’s parents may have to pay a contribution towards the cost of the case, but this will only be expected when the Legal Aid Board has deemed necessary after a thorough assessment of the child’s and/or the parents’ finances. The court may also direct the child or representative to pay some or all of the opponent’s costs in the event that the child loses the case at court. Solicitors’ fees may also have to be paid from any money that is obtained in a successful case, in a “clawback” situation.

Criminal legal aid can be applied for through the Scottish Legal Aid Board’s criminal legal aid programme.<sup>74</sup> If an application for criminal legal aid is successful, it will be free, without any possible clawback. Eligibility for criminal legal aid will depend on whether it is in the “interests of justice” for the applicant to obtain legal aid.<sup>75</sup>

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<sup>70</sup> <http://www.slab.org.uk/public/childrens/eligibility/index.html>.

<sup>71</sup> [http://www.slab.org.uk/Online\\_calculators.html](http://www.slab.org.uk/Online_calculators.html).

<sup>72</sup> <http://www.slab.org.uk/public/childrens/eligibility/index.html>.

<sup>73</sup> <http://www.chscotland.gov.uk/the-childrens-hearings-system/information-for-parents-and-carers/>.

<sup>74</sup> <http://www.slab.org.uk/public/childrens/>.

<sup>75</sup> <http://www.slab.org.uk/public/childrens/eligibility/index.html>.

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practising lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

There are a number of organisations offering pro bono services accessible by children in Scotland. Citizens Advice Scotland is an umbrella body providing essential services to Scottish citizens, including to children.<sup>76</sup> Independent legal advice clinics offer more targeted services, for example, Clan Child Law delivers free legal advice and representation to children and young people in Scotland, and specifically aims to “give practical effect to Article 12 of the [CRC], enabling children to participate fully in decision making processes which affect them and allowing their views to be heard.”<sup>77</sup> The Scottish Child Law Centre provides free legal advice for and regarding children.<sup>78</sup> The Free Legal Services Unit provided by the Faculty of Advocates also aims to provide assistance in cases where the applicant cannot afford to pay for assistance, is unable to obtain public funding and has a meritorious case.<sup>79</sup>

The Government Legal Service for Scotland (GLSS) Pro Bono Network provides a network of individual lawyers involved with the Scottish Government through which pro bono services may be provided.<sup>80</sup>

Conditional fee agreements currently only exist in England and Wales, and have not yet been adopted for the funding of civil litigation in Scotland.<sup>81</sup> However, Scotland has ‘speculative fee agreements’ which are a type of ‘no win no fee’ arrangement. The difference is that the lawyer’s fee is calculated with reference to the judicial expenses payable by the unsuccessful party or by reference to the hourly rate agreed by the solicitor and client, as opposed to agreements which calculate the fee as a percentage of the damages recovered by the client.<sup>82</sup>

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

The time limit for bringing civil cases in Scotland depends on the type of claim brought, as promulgated in the Prescription and Limitation (Scotland) Act 1973<sup>83</sup> and the subsequent amendments in Prescription and Limitation (Scotland) Act 1984.<sup>84</sup> Generally, claims relating to personal injury cannot be brought unless they are commenced within a period of three years after

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<sup>76</sup> <http://www.cas.org.uk/>.

<sup>77</sup> <http://clanchildlaw.org/>.

<sup>78</sup> <http://www.sclc.org.uk/>.

<sup>79</sup> [http://www.advocates.org.uk/FLSUwebsite/about\\_flsu.html](http://www.advocates.org.uk/FLSUwebsite/about_flsu.html).

<sup>80</sup> <http://www.scotland.gov.uk/About/People/Directorates/LPS/glss/GLSSpb>.

<sup>81</sup> For further information, see <http://www.gov.scot/Publications/2013/10/8023/downloads> and <http://www.consumerfocus.org.uk/scotland/files/2012/03/CFS-response-on-review-of-expenses-and-funding-of-litigation.pdf>.

<sup>82</sup> <http://www.gov.scot/Publications/2013/10/8023/19>.

<sup>83</sup> <http://www.legislation.gov.uk/ukpga/1973/52/part/II>.

<sup>84</sup> <http://www.legislation.gov.uk/ukpga/1984/45/contents>.

the date on which the injuries were sustained.<sup>85</sup> In the case of injuries to a child, this three year time period will not commence until the child reaches the age of 16.<sup>86</sup> The time bar period for other types of claims set by the 1973 Act will vary, but the courts have the power to override time limits provisions where it “seems equitable to do so.”<sup>87</sup>

There is no time limit on the bringing of a prosecution in solemn procedure under which the most serious of criminal cases are tried.<sup>88</sup> However, Article 6 of the European Convention on Human Rights states that all people should be entitled to a fair and public hearing within a reasonable time.

In contrast to in England and Wales, there are no time limits on seeking judicial review in Scotland, although the court does have discretion to refuse to grant a review if there is any delay on the part of the applicant which has appeared to impair the proper administration of the case.<sup>89</sup>

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

Provisions regarding the kind of evidence that will be admissible in civil proceedings will be set out in the applicable Court Rules.<sup>90</sup>

In general, children are able to give evidence in Scottish courts, but the court has discretion to decide whether a child has sufficient understanding to give evidence.

The Vulnerable Witnesses (Scotland) Act 2004 provides for the use of special measures for hearing evidence from children, including screens to prevent the child witness from seeing the accused and TV links to enable the giving of evidence remotely.<sup>91</sup> The provisions, however, only applied to children aged under 16.<sup>92</sup>

Standard and further special measures will also apply in children's hearings court procedures on civil matters,<sup>93</sup> including that child witnesses are able to give TV link evidence from a remote location.<sup>94</sup>

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<sup>85</sup> Prescription and Limitation (Scotland) Act 1984, Section 17(2).

<sup>86</sup> Prescription and Limitation (Scotland) Act 1984, Section 17(3).

<sup>87</sup> Prescription and Limitation (Scotland) Act 1973, Section 19A(1).

<sup>88</sup> [http://www.lemac.co.uk/resources/guides/Solemn\\_procedure.htm](http://www.lemac.co.uk/resources/guides/Solemn_procedure.htm).

<sup>89</sup> <http://ukconstitutionallaw.org/2013/07/30/aileen-mcharg-access-to-judicial-review-in-scotland/>.

<sup>90</sup> Chapter 28 of the Ordinary Cause Rules, available at:

<https://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/sheriff-court---civil-procedure-rules/ordinary-cause-rules> and Chapter 35 of the Court of Session Rules, available at: <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap35.pdf?sfvrsn=8>.

<sup>91</sup> <http://www.legislation.gov.uk/asp/2004/3/contents>.

<sup>92</sup> Vulnerable Witnesses (Scotland) Act 2004, Section 1.

<sup>93</sup> Children's Hearings (Scotland) Act 2011, Sections 173-176.

<sup>94</sup> Children's Hearings (Scotland) Act 2011, Section 185(2).

The Victims and Witnesses (Scotland) Act 2014 makes a number of provisions relating to child witnesses. Child witnesses under 18 at the commencement of proceedings are regarded as “vulnerable witnesses” in criminal cases.<sup>95</sup> Child witnesses are automatically entitled to the use of certain special measures, such as the use of a live television link, protective screens, a supporter, and are also able to give evidence from a location outside of the court.<sup>96</sup>

- F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

Information on the average length of time civil court cases take is not publicly available.<sup>97</sup> The Courts Reform (Scotland) Bill, were introduced in the Scottish Parliament on 6 February 2014 includes provisions aimed at improving the speed with which cases are dealt with.<sup>98</sup>

- G. Appeal. What are the possibilities for appealing a decision to a higher court?

For ordinary cause actions from the Sheriff court, appeal will be either to the sheriff principal and the Inner House of the Court of Session or from the Sheriff directly to the Inner House of the Court of Session. Further appeal is possible to the UK Supreme Court, although this will only be for cases in which a particular point of law (rather than a question of fact) needs to be decided or clarified.

Summary cause actions can be appealed to the Sheriff principal on a point of law only, and then to the Inner House of the Court of Session on a point of law, if certified by the sheriff as suitable for appeal. Final appeal may be possible to the UK Supreme Court (again, only on a point of law).

Decision in criminal cases may be appealed to the High Court of Justiciary, from either a lower court or the High Court of Justiciary sitting as a court of first instance itself, for both cases decided under the solemn<sup>99</sup> and summary procedure.<sup>100</sup>

As all judicial review cases can be appealed from the Scottish Court of Session to the UK Supreme Court in London.<sup>101</sup>

Appeals of a children’s hearing order may be appealed in writing within 21 days by the child or within seven days by a “relevant person”, i.e. anyone

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<sup>95</sup> Victims and Witnesses (Scotland) Act 2014, Section 10(a).

<sup>96</sup> See also Victims and Witnesses (Scotland) Act 2014 Explanatory Notes, available at: <http://www.legislation.gov.uk/asp/2014/1/notes/division/3/8?view=plain>.

<sup>97</sup> [https://e-justice.europa.eu/content\\_costs\\_of\\_proceedings-37-sc-maximizeMS-en.do?member=1](https://e-justice.europa.eu/content_costs_of_proceedings-37-sc-maximizeMS-en.do?member=1).

<sup>98</sup> <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/72771.aspx>.

<sup>99</sup> Criminal Procedures Rules 1996, Chapter 15, available at: <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/criminal-procedure/p-art-3/chapter-15.doc?sfvrsn=14>.

<sup>100</sup> Criminal Procedures Rules 1996, Chapter 15, available at: <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/criminal-procedure/p-art-4/chapter-19.doc?sfvrsn=12>.

<sup>101</sup> <http://supremecourt.uk/docs/a-guide-to-bringing-a-case-to-the-uksc.pdf>.

who has received formal notification of the children's hearing and copies of all papers which were considered in the hearing. Appeals are heard by a Sheriff who may discharge the case altogether, order that another children's hearing takes place, or alter the decision.<sup>102</sup>

- H. **Impact.** What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

Being a pluralist or "mixed" system of law, Scots law does not place the same level of importance on precedent as in the rest of the UK. However, the courts do take case law into account, and decisions of the UK Supreme Court in civil cases relating to appeals from Scotland are considered binding precedent. For criminal cases, the precedent from the Court of Justiciary is an important legal source.

For both criminal and civil cases, the influence of precedent may mean that the negative effects of an unsatisfactory decision could be influential and felt for many years, particularly where the decision is issued from a higher court.

- I. **Follow up.** What other concerns or challenges might be anticipated in enforcing a positive decision?

Judicial decisions are respected and the enforcement procedures are clearly set out in legislation. The enforcement process in Scotland is well-established and relatively straightforward.<sup>103</sup> A detailed report on enforcement of civil obligations in Scotland can be found on the Scottish Government website.<sup>104</sup> Enforcement of criminal judgments in Scotland is governed by the Criminal Procedure (Scotland) Act 1995.<sup>105</sup> The enforcement children's hearings orders is dealt with by the Children's Hearings (Scotland) Act 2011.<sup>106</sup>

It should be noted, however, that quashing orders awarded following judicial review proceedings are not directly enforceable against the public body, and do not actually require the body to reach a different verdict.<sup>107</sup>

- V. **Additional factors.** Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

The Children & Young People (Scotland) Act 2014 defines a child as a

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<sup>102</sup> <http://www.chscotland.gov.uk/the-childrens-hearings-system/information-for-parents-and-carers/>.

<sup>103</sup> Ordinary Cause Rules, Chapter 30, available at: <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/sheriff-court/ordinary-cause-rules/chapter-30---decrees-extracts-and-execution.doc?sfvrsn=12>.

<sup>104</sup> <http://www.scotland.gov.uk/Publications/2002/04/14590/3544>.

<sup>105</sup> Criminal Procedure (Scotland) Act 1995, Part XI Sentencing, available at: <http://www.legislation.gov.uk/ukpga/1995/46/part/XI>.

<sup>106</sup> Children's Hearings (Scotland) Act 2011, Part 16 Enforcement of Orders, available at: <http://www.legislation.gov.uk/asp/2011/1/part/16>.

<sup>107</sup> Court of Session Rules, rule 58.4.

person who has not attained the age of 18.<sup>108</sup> In contrast, the Children (Scotland) Act 1995 identifies certain parental responsibilities as only applying to children under the age of 16.<sup>109</sup> Scotland's children's hearings system usually applies to children up to the age of 16 (with exceptions made for those up to 17 years in certain circumstances).<sup>110</sup>

*This report is provided for informational and educational purposes only and should not be construed as legal advice.*

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<sup>108</sup> Children & Young People (Scotland) Act 2014, Section 97.

<sup>109</sup> Children (Scotland) Act 1995, Schedule 4, 6(a).

<sup>110</sup> <http://www.chscotland.gov.uk/media/18967/Practice-and-Procedure-Manual.pdf>.