

Investigation by the Children and Young People’s Commissioner Scotland

This document provides notice that the Children and Young People’s Commissioner Scotland (“the Commissioner”) intends to exercise his powers under section 7 of the Commissioner for Children and Young People (Scotland) Act 2003 (“the 2003 Act”), as amended by Part 2 of the Children and Young People (Scotland) Act 2014, to conduct an investigation into the following subject:

Secure Accommodation: Local Authority Compliance with Legal Duties

As such it fulfils the Commissioner’s duties under section 8 of the 2003 Act to bring the investigation to the notice of persons likely to be affected by it. In the Commissioner’s judgement, these persons are those set out in Appendix A.

Statement of legal compliance

I have determined that this investigation falls within the scope of my investigative powers under section 7 of the 2003 Act and in particular is permitted under section 7(3) of that Act.

A handwritten signature in black ink, appearing to read 'Adanson', is positioned above the printed name of the Commissioner.

Children and Young People’s Commissioner Scotland

10 December 2019

Investigation Terms of Reference

Subject

Secure Accommodation – Local Authority compliance with legal duties

Rights engaged

Art 5 ECHR (deprivation of liberty), Art 6 ECHR (fair hearing), Art 3 UNCRC (best interests), Art 9 UNCRC (separation from parents), Art 12 UNCRC (right to be heard), Art 20 UNCRC (special protection for children in care), Art 40 UNCRC (children who have infringed the penal law)

Purpose of investigation

To establish whether Local Authorities are respecting children's human rights by fulfilling their legal obligations towards those children who are placed in secure accommodation. Namely:

1. To consult and take into account the views of the child before making a decision whether to implement the authorisation
2. To notify the child of the decision within 72 hours. The notification must be in writing and must include reasons for decision and right to appeal/review.

Reason for investigation

Deprivation of liberty is one of the most serious interferences the State can make into an individual's human rights. Article 5 of the ECHR requires that it only be done in a limited set of circumstances and in accordance with a procedure prescribed by law. In Scots law, the main procedure for children to be deprived of their liberty in secure accommodation is authorisation by a children's hearing, and then a decision by the Chief Social Work Officer (CSWO) and the Head of the secure unit to implement that authorisation.

The implementation decision requires the CSWO to comply with a number of legal duties set out in the Children's Hearings (Scotland) Act 2011 (Implementation of Secure Accommodation Authorisation) (Scotland) Regulations 2013. These duties are to consult with the child and then to notify them of the decision and their right of appeal in writing within 72 hours. These duties reflect children's rights in terms of Arts 5 and 6 ECHR, as well as a range of UNCRC rights.

Concerns were raised following implementation of the Children's Hearings (Scotland) Act 2011 that these duties were not being complied with. We understand that the Scottish Government wrote to all local authorities to remind them of the need to comply with their legal duties.

However, we have been told that local authorities are still not routinely complying with their legal duties. This is particularly significant because the regulations provide that if written notification is not sent within 72 hours, the CSWO will be deemed to have made a decision not to implement the secure authorisation and any further deprivation of liberty will be unlawful.

If true therefore, this means that children and young people in secure accommodation are not having their voices heard in decision making, are not aware of their rights to appeal/review decisions, and may be unlawfully deprived of their liberty. Given the significance of the potential rights breaches, the Commissioner wishes to establish as a matter of urgency whether and to what extent this is the case.

Statement of Legal Compliance

Under the terms of the Children and Young People's Commissioner (Scotland) Act 2003, as modified by the Children and Young People (Scotland) Act 2014, the Commissioner has the power to investigate:

"whether, by what means and to what extent, a service provider has regard to the rights, interests and views of children and young people in making decisions or taking actions that affect those children and young people."

Local Authorities are service providers under the terms of the 2003 Act and the 2011 Regulations clearly set out children's rights when deprived of their liberty in secure accommodation.

The Commissioner's powers of investigation are not without limit and in particular cannot be exercised where to do so would duplicate work that is properly the responsibility of another body. In this case, we have identified the Care Inspectorate and the Scottish Public Services Ombudsman (SPSO) as potentially having an interest in terms of their statutory functions.

The Care Inspectorate is responsible for inspecting and regulating registered care providers (as defined in S.47 and Schedule 12 of the Public Services Reform (Scotland) Act 2010). This includes secure accommodation providers. However, the Care Inspectorate has made clear its view that assessing the lawfulness of placements is not part of its remit.

In any case, the legal duties are on the CSWO rather than the secure provider. This potentially brings it into the remit of the SPSO which investigates complaints about maladministration or service failure. However, the SPSO can only respond to individual complaints; they cannot conduct a general investigation as proposed by the Commissioner. It is unreasonable to expect individual children and young people to address these issues through complaints if the failure to comply with the law is indeed systemic.

Given the significant rights issues raised, and the apparent lack of any other body which can legitimately address this specific matter in this way, it is the Commissioner's view that it falls within the scope of his legal powers. The significance of the rights breach if the concerns are made out, means that it is necessary for the investigation to be conducted formally so that evidence can be laid before the Parliament.

Appendix A

The Commissioner believes the following are interested parties in terms of Section 8 of the 2003 Act.

Chief Social Work Officers of the 32 Local Authorities

Maree Todd MSP, Minister for Children and Young People

Members of the Secure Care Strategic Board

Members of the Secure Care Group