

Coronavirus Bill Legislative Consent Memorandum

Briefing for MSPs

Established by the Commissioner for Children and Young People (Scotland) Act 2003, the Commissioner is responsible for promoting and safeguarding the rights of all children and young people in Scotland, giving particular attention to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner has powers to review law, policy and practice and to take action to promote and protect rights.

The Commissioner is fully independent of the Scottish Government.

Key messages

- It is legitimate for the Scottish Government to seek proportionate and necessary emergency powers to respond to the Covid-19 pandemic
- However, the exercise of some of these powers has the potential to negatively impact children's human rights
- The Scottish Government should therefore
 - ensure that the Scottish Parliament can authorise, scrutinise and review the use of these significant powers by Ministers
 - ensure it can respond as a matter of urgency to unintended consequences and negative impacts on children's rights
 - explain what safeguards, guidance and direction will be put in place to ensure children's human rights are protected
 - commit to providing regular updates to the Parliament on the human rights impact of these provisions

Briefing

The Covid-19 pandemic has posed unprecedented challenges in the last few weeks. We commend the Scottish Government and Scottish public services, particularly the NHS, for their responses to the crisis thus far. In particular, we welcome the clear communication on the importance of acting to protecting the right life, of prioritising the right to health and of safeguarding the most vulnerable in our society.

We recognise that there is a need for the Scottish Government and public services to have the flexibility to respond quickly as the crisis develops. This means that the Government must take on some emergency powers in order to meet the challenges posed by the pandemic and to protect public health.

However, it is at times of emergency and crisis that hard-won human rights protections are most vital, and most at risk. This Bill has been described as the most

sweeping and far-reaching emergency powers legislation since the Second World War. It represents a huge transfer of power to Scottish Ministers, and through them to local authorities. The effect of some of these powers is to temporarily overturn and/or bypass some of the human rights protections established in law by the Scottish and UK Parliaments. Whilst international human rights law allows for this in response to emergencies, it requires very careful consideration and justification and the legal test for derogation from human rights standards is rightly very high. Article 15 of the ECHR requires that it only be done in time of war or other public emergency threatening the life of the nation and only:

“...to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”.

We note with great concern that these powers are intended to operate for a period of up to two years without any provision for scrutiny or reconsideration by the UK or devolved legislatures. We strongly support the amendments to reduce the timescale from two years to six months currently before the UK Parliament.

In any event, we ask the Scottish Government to commit to ensuring that the Scottish Parliament can properly authorise and scrutinise the use of these powers by Ministers and their consequences in the devolved context. The role of the Parliament is made all the more important by the understandable pace at which this legislation has been drafted and the limited scrutiny to which it will be subjected before becoming law. We note the comments made by Michael Russell MSP, Cabinet Secretary for the Constitution, Europe and External Affairs, that the powers:

“...will only be used if required. I make a commitment that we will institute, after discussion across the Scottish Parliament, appropriate reporting on how and when the powers in the Bill have been used by the Scottish Government.”

While this is welcome, the Scottish Parliament is a human rights guarantor and provision must be made for it to play that role, which goes beyond simply reporting and into scrutiny and accountability of the exercise of executive power. This legislation must remain under constant review.

There is also a significant risk that the timescales available for drafting and scrutiny result in unintended consequences in terms of how the legislation operates in practice. This risk is exacerbated by the extremely challenging situation which creates pressures on Ministers, officials and public services. We will be seeking assurance therefore that the Government will respond as a matter of urgency to concerns raised by ourselves and others if it appears that unintended consequences and negative impacts on children’s rights are being played out as a result of the exercise of the powers in this Bill.

It is critical that the rights of the most vulnerable in society continue to be protected. This includes but is not limited to; children with disabilities and additional support for learning needs (ASN), those with caring responsibilities, looked after and care experienced children and young people, and children who are deprived of their liberty. We have some specific concerns about these groups, but we note that the

limited time available means that we have not been able to undertake a full analysis of the Bill's provisions.

The Bill (in Schedule 20) provides significant powers to police, immigration officers and public health officials to arrest people deemed infectious, to place them in isolation and to take biological samples taken from them without their consent. While we understand the rationale for these powers, and while it is permissible to interfere with the right to liberty and security (Article 5 ECHR) where proportionate to protect public health, we seek confirmation from ministers on what additional safeguards would be put in place where the "infectious person" is a child.

Part 13 of the Bill permits a relaxation of child protection and safeguarding legislation, which would enable an individual barred from undertaking regulated work with children to do so. We seek confirmation from ministers on the circumstances in which this power might be exercised and how children's rights to protection from abuse and harm would be protected.

It is hard to see how suspension of legal duties to assess the needs of children with ASN, disabilities, care experienced children or young carers (Part 7 of the Bill) is compatible with protection of those whose rights are most at risk, and with the Scottish Government's approach of prioritising the most vulnerable. Needs assessment is the vehicle that allows vulnerable children to be identified and their rights and wellbeing needs to be met. We seek assurance from ministers on how this provision is intended to work in practice and what guidance or direction will be put in place to ensure children's rights are protected.

More specifically, the Bill provides for very significant reductions in the safeguards set out in the Mental Health (Care and Treatment) (Scotland) Act 2003. For example, Schedule 8(9) suspends the provision for review of compulsory treatment orders at the statutory time limits, which will mean the order can continue without a statutory review. This means that children may be subject to compulsory treatment without formal review for much longer than is currently permitted. We understand that around a hundred or so children and young people are the subject of orders under the 2003 Act and there will need to be clear guidance and direction given to ensure their right to a fair hearing (Article 6 ECHR) and their right to respect for private and family life (Article 8 ECHR) are not negatively impacted.

Schedule 15 of the Bill removes the obligation on education authorities to provide free school meals to those entitled to them, and allows for the removal of the obligation on education authorities to provide education and to make provision for those with additional support needs. Among the groups particularly at risk are those in rural areas, those experiencing poverty and children with complex medical and/or additional support needs. We have already heard of instances where residential education and care placements for children with complex needs are in some cases being withdrawn abruptly. We appreciate that the situation is evolving and that local authorities are still developing services to support pupils but are extremely concerned that this Bill would remove these duties altogether, with impacts not just on children's rights to education, but also to health (including mental health).

While we recognise the need for local authorities to be able to respond to specific local needs and resource challenges, human right standards are not subject to local discretion. We therefore also seek assurance from Ministers that they will use the power(s) contained in the Bill to direct (rather than to guide) local authorities in the use of these powers where necessary to ensure that children’s human rights are protected.

Despite the crisis we face, it is important that Scotland continues to honour its human rights obligations to children and young people, and that Ministers and public bodies continue to act in line with Convention rights and with their other international human rights law obligations. We suggest that Ministers commit to providing regular updates to the Parliament on the human rights impact of these provisions so that the legislation can be kept under close and detailed review.

Children and Young People’s Commissioner Scotland

31 March 2020