

Education and Skills Committee

Submission of the Children and Young People's Commissioner Scotland. 8th March 2021

This is an exciting time for children's human rights in Scotland. This year, the Commissioner for Children and Young People (Scotland) Act 2003 which created our office will be 18 years old. And, with the stage three debate of the United Nations Convention on the Rights of the Child (Scotland) Bill taking place next week, Scotland will (hopefully) become the first country in the UK to incorporate the United Nations Convention on the Rights of the Child (UNCRC) into domestic law.

The work of our office over the last year has been dominated by the response to the coronavirus pandemic. Nonetheless, we have continued to focus on achieving the aims of our Strategic Plan¹. This briefing details some of our main areas of work over the last year.

Our Young Advisers

Every year our office recruits a group of young people to act as advisers to the Commissioner. Their role is to guide the direction of the work we do and to help us make decisions on some of the important issues that affect them and their peers. 2020 was a year like no other and they had lots to say.

Whilst we would usually meet face to face, coronavirus restrictions meant that we all had to adapt. Moving online meant more frequent meetings and those young people who live on the islands and in more rural areas were able to participate without the disadvantage of days of travel.

As well as talking to the SQA about their communications policies, some Young Advisers worked with Police Scotland to develop national guidelines and advice on how best to approach young people during the pandemic. They talked to national newspapers to get their views across, wrote articles for the website, blogged, vlogged and made instastories to highlight to others the important issues that were concerning them. Young Advisers spoke at conferences and events, including European and UN events.

"I feel too often that young people are used by politicians to keep their comms teams happy and to keep up public appearance. People seem to be very happy to have children active within politics until they disagree." Hope, Young Adviser

¹ <https://cypcs.org.uk/about/plan/>

Coronavirus Pandemic

Emergency legislation and public health restrictions

The Scottish and UK Governments responded to the pandemic by enacting emergency legislation intended to protect public health, but which also impacted significantly on a wide range of children's human rights. It was clear that the pandemic would not only be a health emergency, it would be a human rights emergency. We produced a range of briefings to highlight the impact on children's human rights and to support MSPs in their scrutiny of this legislation. These can be found on our website².

We have continued to monitor developments in public health restrictions as restrictions were eased in summer 2020, reintroduced during autumn and winter 2020 and in plans for renewed easing of restrictions during 2021. We have regularly engaged with Scottish Government and other public authorities, including participation in Police Scotland's Independent Advisory Group on policing during the pandemic.

Independent Children's Rights Impact Assessment (CRIA)

In May 2020 we commissioned the Observatory of Children's Human Rights in Scotland to carry out an independent CRIA on the impacts of the pandemic. CRIA are an important way to look at the potential impact (positive and negative) on children and young people of laws, policies, budget decisions and services as they are being developed, and suggest ways to avoid or mitigate any negative impact.

Nine different impact assessments were carried out by experts, to help us understand how the emergency measures were affecting children and young people's rights in a range of different areas of their lives, including poverty, mental health, physical health, and education³.

Drawing on the analysis of the independent CRIA we made several high-level recommendations around what Scottish Government and others needed to change.

One of the key changes was centred around addressing the lack of recognition of children and young people as rights holders during the pandemic response. The structures within which we make decisions need to be fundamentally rethought to enable children and young people to take an active role in their own lives and communities.

"Life-changing decisions being made during coronavirus have felt like playing a game. Every time it should be our turn, someone skips over us and we end up left behind and forgotten". Abigail, Young Adviser

Since publication of the impact assessment we have drawn on the findings to evidence and inform our work to promote and protect children's human rights during the coronavirus pandemic. In particular, the findings have informed our briefings to parliamentarians and parliamentary committees on emergency measures as well as our positions on a range of issues including use of face coverings and cancellation of the exams in 2020.

² <https://cypcs.org.uk/coronavirus/our-coronavirus-work/>

³ <https://cypcs.org.uk/coronavirus/independent-impact-assessment/>

Young Advisers' CRIA

It became clear early on in the pandemic that decisions were being made about children and young people's lives with little or no consultation. Schools were closed, exams were cancelled, meeting others was restricted and travel was impossible. Our Young Advisers carried out a rapid impact assessment on the cancellation of the exams using a framework for Child Rights Impact Assessment (CRIA). The finished impact assessment was shared with MSPs, the SQA and researchers investigating the exam cancellations. It also added to our understanding of CRIsAs, how they can be carried out by young people and how they can be used to hold duty bearers to account.

Education and SQA exams

Since the decision to cancel the 2020 exam diet was announced, our office has highlighted the impact the decision has had on children's human rights. This has included writing to and meeting with the Scottish Government, Education Scotland, the SQA, as well as providing this Committee with regular briefings.⁴ We also provided a submission to Professor Mark Priestley's review of the cancellation of exams.⁵ We have been hoping that lessons have been learnt from the experience in 2020 but remain concerned that some children will experience the same breaches of their rights for a second year. In particular, we have highlighted the ways in which the current SQA exam appeals process fails to realise children's right to due process and to an effective remedy and have, as yet, seen no proposals which would address this either for children affected in 2020 or future cohorts.

We have also continued to highlight issues of digital exclusion and their impact on children's human right to an education, particularly during periods where children are not able to attend school. We are aware that a significant number of devices have been distributed but remain concerned that there may still be barriers for children to access online learning.

Mental Health

The Commissioner has consistently highlighted the ongoing impact the pandemic will have on children and young people's mental health. Whilst the government's provision of 350 counsellors in secondary schools is welcome, this was announced before the pandemic, to meet unmet need that already exists. It is not clear whether this target has been met. We are concerned at growing evidence that the pandemic has significantly increased the number of children in need of mental health support. We are particularly concerned at the lack of community-based mental health support in some areas. Young people have highlighted this as an area of concern with us and we are planning further work on this over the next year.

Broader work

Incorporation

Incorporation of the UNCRC into Scots law is the single most important legislative development for children's human rights in Scotland. It has been the focus of our office over many years. We have worked closely with Scottish Government and a

⁴ <https://cypcs.org.uk/coronavirus/sqa-results-2020/>

⁵ <https://cypcs.org.uk/wpcyocs/wp-content/uploads/2020/09/Priestley-Review-response.pdf>

range of other stakeholders to improve knowledge and awareness of the importance of incorporation and how it will ensure children's human rights are realised. Our briefings and other work on incorporation are available on our website⁶.

The UNCRC (Incorporation) (Scotland) Bill provides the office with new express powers to litigate on children's human rights issues. We therefore have an opportunity to be more planned and proactive about the cases we take, linked to our Strategic and Delivery Plan priorities. We can actively seek out cases on priority issues without needing to rely on a child or family bringing proceedings on their own account. However, our resources (primarily staff time) are limited. This means that we will need to ensure we make best use of our available resources, that we use the powers in an appropriately strategic way, and that all of our decisions are fair, open and transparent.

It is critical that the culture change we expect to see as a result of incorporation extends to the legal system; that children and young people are able to get direct access to justice; that they are able to take their own cases and be supported to do so by all parts of the system. Buy-in of the judiciary and the legal profession will be necessary to achieve this. It will be particularly important for the next generation of lawyers to be inspired and empowered to embrace the opportunities that incorporation brings.

Strategic Litigation

The Commissioner's office has begun to develop its capacity to engage in Strategic Litigation over the last 2-3 years. However, our founding legislation (the Commissioner for Children and Young People (Scotland) Act 2003) provides no express power to litigate. We have therefore relied on implied powers to intervene in the public interest. In doing so, we apply similar criteria as for the exercise of our investigative powers.

Cross-Border deprivation of liberty.

We intervened in cases at the Court of Session and the UK Supreme Court to raise human rights concerns about English/Welsh children being deprived of their liberty by English court orders in privately managed Scottish residential units that are not registered or inspected as secure care providers. The Supreme Court decision is imminent and will have implications for these children's rights whilst living in Scotland.

European Network of Ombudspersons for Children (ENOC)

In 2020 ENOC chose child rights impact assessment (CRIA) as its priority theme, committing to carrying out extensive work on CRIA, as a key measure for implementing the UNCRC and advancing the rights of children and young people. As Bruce Adamson was Chair-Elect of ENOC in 2020, our office led the work on the priority theme. Our office hosted a working seminar for ENOC members on CRIA. The event brought together online over 50 participants from across Europe to discuss and exchange views to develop an ENOC position statement, with a comprehensive set of recommendations providing guidance on how to implement CRIA and promote the visible integration of children's human rights in decision-

⁶ <https://cypcs.org.uk/incorporation/>

making. This was adopted at the 24th ENOC General Assembly, hosted online by our office⁷.

European Network of Young Advisers

The European Network of Young Advisers (ENYA) works to inform the European Network of Children’s Ombudspersons (ENOC). Every year both adults and young people work on a new topic related to children’s human rights. In 2020 we worked on Child Rights Impact Assessments (CRIAs) using LGBTIQ+ rights as a case study⁸. An online weekend seminar, hosted by Norway, was a great example of effective participation and young people came together through a series of games, workshops and plenaries to come up with recommendations to take to the annual ENOC Conference. Our Young Adviser, Jonathan, reported on his experience for us and his blog post is available on our website⁹.

UNCRC reporting

Every 5 years, the United Nations Committee on the Rights of the Child assesses whether children’s human rights are being respected by States which have ratified the UNCRC. We co-ordinated a report to the UN Committee on behalf of the four UK Children’s Commissioners, which was submitted late last year¹⁰. We included an annex on the impact the Coronavirus Pandemic has had on children’s human rights¹¹.

The four Commissioner’s offices also worked with children across the UK to write a report called, “Are we there yet? Our Rights, Our Say”¹². This report highlights the ways that children and young people across the UK are getting their rights realised and places where more work is needed to protect their rights.

Children (Scotland) Act 2020

The passing of this Act, in June 2020, linked together several strands of work over the past ten years, including our work on domestic abuse and child contact and on strengthening children’s ability to participate when decisions that affect them are made.

Investigations

Since the creation of the office’s Advice and Investigations Team in 2017, we have been developing a model that utilises investigations as a strategic tool, in a targeted way, to identify and address issues affecting children’s human rights. In making the decision about using our powers we consider a range of different factors and criteria; including the scope, scale and urgency of the alleged rights breach; the vulnerability of the children and young people involved; the resource and expertise we can bring to bear; what other work is taking place on the issue; and the potential outcome we could achieve. They involve significant time and resource and are not undertaken

⁷ <http://enoc.eu/wp-content/uploads/2020/11/ENOC-2020-Position-Statement-on-CRIA-FV-1.pdf>

⁸ http://enoc.eu/?page_id=3605

⁹ <https://cypcs.org.uk/news-and-stories/young-adviser-jonathan-blog/>

¹⁰ <https://cypcs.org.uk/wp-content/uploads/2020/12/crc-report-2020.pdf>

¹¹ <https://cypcs.org.uk/wp-content/uploads/2020/12/crc-report-2020-covid-annex.pdf>

¹² <https://cypcs.org.uk/wp-content/uploads/2020/12/cco-are-we-there-yet-final.pdf>

lightly. We are currently preparing an investigation into children's rights to mental health support, which will be led by our new Young Advisers throughout 2021/22.

Current investigation - Secure Accommodation

We are currently in the final stages of an investigation which will establish whether and to what extent children detained in secure accommodation may have been unlawfully deprived of their liberty due to a failure to respect procedural legal safeguards. The investigation was delayed by the pandemic and we will report to the Scottish Parliament on our findings and conclusions upon receipt of the final comments from Chief Social Work Officers. This will lead onto a second stage of proposed work looking at solutions in the context of the recommendations of 'The Promise' and implementation of the incorporation bill.

Actions short of investigation

While much of the children's human rights advice provided by the office is "first line" and involves signposting, referral, and general information about children's rights, there are cases that require more in-depth work, and enquirers who need more support, even where we choose not to invoke the office's formal powers of investigation. This is particularly the case where we are contacted by children and young people.

For example, the office provided a great deal of support and advice to the children and families of the former New School Butterstone following its sudden closure. Our focus was on ensuring that the children were provided with alternative educational provision and their rights were upheld, and we submitted evidence to the independent review undertaken by James Martin on that basis¹³.

Youth Justice

Our office has continued to work on realising children's human rights when they are in conflict with the law, including work on the use of restraint and restrictive practices; children's use as covert human intelligence sources; and addressing the inappropriate criminalisation of children. We have also undertaken joint work with the Children's and Young People's Centre for Justice to highlight the rights of children detained in prison-like settings¹⁴.

Looking forward

Incorporation of the UNCRC provides an unrivalled opportunity to improve children's lives. Implementation of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill will occur against the backdrop of recovery from a global pandemic.

We have some idea of the impacts of the pandemic on children and young people's lives. We know that they have experienced loss and isolation, but we don't yet know

¹³ <https://www.gov.scot/groups/new-school-butterstone-closure-independent-review/>

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https://www.celcis.org/files/5916/1468/5804/2021_Vol_20_No_1_Lightowler_C_Not_cut_out_for_prison_Depriving_children_of_their_childhood.pdf

the full effects or the lasting impact of the pandemic. At this time, it is important to focus on recovery and rebuilding children's lives and wellbeing.

Many children, parents and school staff have worked very hard at maintaining children's learning over the last 12 months, despite school closures. We therefore caution against using the language of children "being behind" and "catching up". Undoubtedly schools will need to address gaps in learning which have arisen, particularly for those children who have been disproportionately impacted. But it is also vital that children are given the opportunity to address the gaps in childhood they have experienced – including time with friends and family, time to socialise and play, and time to create new school routines. We need to ask children and young people what they need and listen to them.

It is important that lessons are learned from the experiences of the last year and that progress made is not lost. Online learning could continue to provide opportunities for children who are unable to attend school for health reasons (including mental health issues). Whilst the pandemic has increased inequalities it has also provided the impetus to address issues such as holiday hunger and digital exclusion. This must be built upon, not lost.

Last year, our Young Advisers identified three key human rights issues that needed urgent attention. These were poverty, mental health, and climate justice and will form the basis of our work over the rest of our current Strategic Plan¹⁵. We look forward to continuing to support the Scottish Parliament and its committees in their role as human rights guarantors.

For further information, please contact Megan Farr, Policy Officer at megan.farr@cypcs.org.uk or 07803 874 774

¹⁵ <https://cypcs.org.uk/about/plan/>