

**Education, Children and Young People Committee  
Covid-19 Recovery Committee  
Coronavirus (Recovery and Reform) (Scotland) Bill  
Evidence of the Children and Young People's Commissioner Scotland.**

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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.

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The Covid-19 pandemic created unprecedented challenges for public services and for Scotland as a whole. The response of the Scottish Parliament to the challenge this presented was impressive. Emergency legislation was debated at short notice and in very challenging conditions. As the pandemic progressed, the move to virtual and hybrid sittings ensured that MSPs were able to continue in their role as human rights guarantors, scrutinising not only emergency legislation but continuing the parliamentary process for a wide range of legislation.

The emergency powers put in place in response to the pandemic, in Scotland and the rest of the UK, represent some of the most serious interferences with the human rights of the general population of this country since the Universal Declaration on Human Rights was adopted more than 70 years ago.

As we highlighted in our briefings to MSPs in relation to the UK Coronavirus Act and the two Scottish Coronavirus Acts,<sup>1</sup> international human rights frameworks recognise states' need for flexibility in a time of national emergency. This is acknowledged in Article 15 of the European Convention on Human Rights (ECHR) and Article 4 of the International Covenant on Civil and Political Rights (ICCPR).

However, states' abilities to interfere with human rights in a time of emergency are not unlimited. Any emergency powers must be **lawful, necessary, proportionate** and **time limited**. They must be limited to the extent strictly required by the situation.

We therefore have considerable concerns about the proposals in this legislation which would place what were **time limited** emergency measures permanently into statute, for use by any future government without prior reference to Parliament.

When introduced in 2020, these powers represented a serious, albeit **necessary** response to an unprecedented situation. We broadly supported their introduction at that time, providing MSPs with a series of briefings as emergency legislation was considered<sup>2</sup>. They were, in the main, **proportionate**, given the life-threatening gravity of the pandemic, and the lack of information about the impact it would have on children and young people. That they were introduced via Acts of Parliament ensured they were **lawful**.<sup>3</sup> And they were **time limited** – with the Scottish Government having to return to the Scottish Parliament to renew them after set periods of time.

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<sup>1</sup> CYPCS. Our Coronavirus Work. <https://cypcs.org.uk/coronavirus/our-coronavirus-work/>

<sup>2</sup> See Our policy work on emergency legislation. <https://www.cypcs.org.uk/coronavirus/our-coronavirus-work/>

<sup>3</sup> Though we note this is not entirely uncontested

Both the Scottish and UK Parliaments were able to pass legislation to meet the challenges presented by the pandemic on an emergency basis in March and April 2020. Since that time, both have improved their capacity to operate on a virtual basis and they are doubtless now better prepared for future emergencies as a result. The Scottish Parliament, in particular, is in a very robust position to deal with future emergencies. It is essential that in any future situation in which they are required, emergency powers are subject to sufficient parliamentary scrutiny to ensure they are **necessary** and **proportionate** in the context of the specific situation in which they are to be applied.

Permanent powers which permit serious interference with human rights, by definition, do not meet the requirement to be **time limited**. Even if not used, they may therefore not be lawful under the terms of Article 15 of the ECHR. Rather than having powers ‘on the books’ or ‘just in case’, Government must ensure they have draft legislation prepared, and kept under review, in anticipation of any future emergency. And rather than reacting to the last emergency, they must plan for a range of scenarios. If this planning is conducted in a transparent manner, with public engagement and with appropriate impact assessment, it has the potential to strengthen public confidence and adherence to restrictions in a future emergency. That said, we make specific comment on a number of the provisions below.

### **Education Closures**

We are concerned at the extent of permanent measures relating to the closure (and opening) of educational establishments in Part 2 of this Bill. For example, in section 8, the Bill provides Scottish Ministers with the power, by regulations, to direct educational establishments in a wide range of ways, subject only to Ministers having “regard to advice from the Chief Medical Officer”. The scope of the provisions is illustrated by the case of child minders working in their own homes, who may be subject to regulations made by Ministers over part of their home.

The powers given to Scottish Ministers by Part 2 of the Bill provide the opportunity for substantial interference into children’s right to an education, as well as a wide range of their human rights. The impact that the two extended periods where schools were closed to most children has been well documented over the past two years and we draw the Committee’s attention to our evidence to the Education, Children and Young People Committee earlier this session, together with the work our office has done during the course of the pandemic.<sup>4</sup>

We reiterate our concern that for these to sit “on the books” reduces the opportunity for parliamentary scrutiny, even where regulations are required to be made using the affirmative procedure and be reviewed regularly. We highlighted our concerns about the use of this procedure in our submission to Delegated Powers and Law Reform’s inquiry on this in December 2021.<sup>5</sup>

More importantly, although similar powers were introduced at the beginning of the pandemic, our understanding is that for the large part they went unused. We are

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<sup>4</sup> CYPSC. Our Coronavirus Work. <https://www.cypcs.org.uk/coronavirus/our-coronavirus-work/>

<sup>5</sup> CYPSC. Inquiry into use of ‘made affirmative procedure’ during the coronavirus pandemic. [2021]. <https://www.cypcs.org.uk/resources/made-affirmative/>

therefore unconvinced their inclusion in legislation on a permanent basis is proportionate.

## **Children in Prison**

Last week there were **14** children in prison (Polmont Young Offenders Institution) in Scotland.<sup>6</sup>

Only **3** of those children have been convicted and sentenced. All of the other children were detained on remand.

Since the start of the first lockdown, an average of **12** untried children have been held in Scottish prisons each week.

In the last ten years, **2** children have died by suicide in prison in Scotland.

No child has been released under the early release provisions in the Coronavirus (Scotland) Act 2020.

While the number of children in prison has declined in recent years, and this is to be welcomed, it is unacceptable that any child be imprisoned in Scotland. We recently wrote to the Cabinet Secretary for Justice and Veterans and the Minister for Children and Young People expressing our concerns that we had heard that a child had been remanded to Polmont YOI for failure to appear at court **as a witness**. We are also aware of potential child victims of trafficking being remanded to prison.

Over the course of the pandemic, the proportion of children on remand has increased. During the first three months of the first lockdown, an average of **41%** of the children in prison were on remand or awaiting sentence. In the last 3 months that figure was **78%**.

At the beginning of the pandemic, the UN Committee on the Rights of the Child warned against the “grave physical, emotional and psychological effect of the ... pandemic on children” and called on States to protect the rights of children. They called for the immediate release of children in all forms of detention.<sup>7</sup> The particular risks to children in prison were highlighted in the Independent Children’s Rights Impact Assessment (CRIA) we commissioned in the early stages of the pandemic. The risks associated with increased periods on remand due to delays in court processes and extensions permitted by the emergency measures were clear, even at that stage.<sup>8</sup>

Children have been disproportionately impacted by many aspects of the pandemic but the impact on children in prison has been particularly stark. We participated in the pre-inspection survey of Polmont YOI carried out by Her Majesty’s Chief Inspector of Prisons. The report, published in October 2021, reinforced the views we expressed to the Scottish Parliament’s Justice Committee on 25 May 2020, and again on 13 October 2021, that conditions for children in prison were in breach not

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<sup>6</sup> As at 18 February 2022. SPS. SPS Prison Population. [2022]

<https://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx>

<sup>7</sup> UN Committee on the Rights of the Child. Statement on Children’s Rights and the Covid-19 Pandemic. [2020].

[https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/1\\_Global/INT\\_CRC\\_STA\\_9095\\_E.docx](https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/1_Global/INT_CRC_STA_9095_E.docx)

<sup>8</sup> CYPCS. APPENDIX 9: Children in Conflict with the Law and Children in Secure Care: Children’s Rights Impact Assessment (CRIA). [2020] <https://www.cypcs.org.uk/wpcypcs/wp-content/uploads/2020/07/CRIA-appendix-conflict-law.pdf>

only of the UNCRC, but also the prohibition on torture, inhuman and degrading treatment or punishment in terms of Article 3 of the European Convention on Human Rights (ECHR). There were serious concerns about children's limited access to mental health and other therapeutic supports; children spending 23 hours a day in their cells; routine strip-searching; authorisation of pain-inducing restraint; lack of purposeful activities including access to work, leisure, libraries and education; lack of family contact; and lack of access to telephones.

Although we are told by the Scottish Prison Service that this situation has improved, we are aware that in the case of an outbreak or new variant, conditions may deteriorate very quickly and not all of these issues can directly be attributed to the pandemic.

At present, children who have not yet been tried cannot benefit from the early release provisions in the Coronavirus (Scotland) Act 2020. Indeed, the extensions to pre-trial and pre-sentence remand periods and adjournment periods which the Scottish Government propose extending in this Bill will result in children being held in prison for longer periods than before the pandemic. Likewise, new sentencing guidelines will not reduce the number of children held on remand.

We believe that, should these temporary justice measures be included within the Bill, section 44 should be amended to ensure that untried children can be considered for early release based on an individualised assessment of risk and their human rights. We also call on the courts and COPFS to do all they can to minimise the use of remand at this time.

### **Additional Provisions**

In the consultation ahead of the publication of this Bill, the Scottish Government proposed to develop and embed new ways of working in public services, building on the innovation which occurred in response to the pandemic. We believe this is something that should continue to be considered. There is the potential to improve services and, importantly, provide increased opportunity for children to participate when decisions are made about them.

However, the Scottish Government must ensure that all measures are compatible with children and young people's legal and human rights, under both domestic legislation, such as the Equality Act 2010, and international law such as the European Convention on Human Rights (ECHR), the UN Convention on the Rights of the Child (UNCRC) and the UN Convention on the Rights of Persons with Disabilities (UNCRPD). Proposals must be accompanied by comprehensive impact assessments including a CRIA.

For example, online hearings in the Children's Hearings system and in court and tribunal proceedings have the potential to improve the ability of some children and their families to participate in decision making, however during the pandemic they have also presented barriers to individual's rights, to access to justice and to procedural fairness. A decision to hold a hearing online should be based on the individual child's needs, rights and best interests, and not on organisational exigencies.

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