

**Delegated Powers and Law Reform Committee
Inquiry into use of 'made affirmative procedure' during the
coronavirus pandemic
Evidence of the Children and Young People's Commissioner Scotland.**

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.

The Covid-19 pandemic resulted in the use of emergency powers which represented some of the most serious interferences with the human rights of the general population since the Universal Declaration on Human Rights was adopted more than 70 years ago¹. These restrictions often had a disproportionate affect on children and young people.

Prior to the pandemic, the Scottish Parliament's 'made affirmative' procedure was seldom used. In a time of public health crisis it has been a valuable tool for passing urgent legislation quickly. Often this legislation has involved significant interferences with human rights. Even in response to a national crisis, such interference can only be justified if it is proportionate, necessary, lawful and time limited. We have three main concerns about the way in which the 'made affirmative' procedure operated in practice.

1. Short notice publication and lack of advance scrutiny

The made affirmative procedure has meant that a great deal of legislation has been put in place with parliamentary scrutiny only occurring retrospectively. While we appreciate the urgency of the situation and the pressures on Scottish Government, too often the text of regulations were published scant hours before they came into force. We highlighted concerns around this practice directly to Scottish Government officials, and they were also expressed by others including the Chair of the Independent Advisory Group on Police Use of Temporary Powers Relating to the Coronavirus Crisis.² It was not always clear that such short notice publication was necessary, or that it was not possible for parliamentary scrutiny to take place in advance.

The Parliament should constructively challenge the Scottish Government on the use of the 'made affirmative' procedure and ensure that it is only used where absolutely necessary and that the text of proposed regulations are available in good time before they come into force.

¹ CYPES. 2021. Covid Recovery. https://www.cypes.org.uk/?post_type=resources&p=16728&preview=true

² <https://www.spa.police.uk/spa-media/de1aqay3/iag-letter-to-csj-12-2-final.pdf>

2. Absence of Children’s Rights Impact Assessments

In the early stages of the pandemic, we commissioned the Observatory of Children’s Human Rights Scotland to undertake an independent Children’s Rights Impact Assessment (CRIA) on the impact of the pandemic and the state response on children and young people. We were concerned that the Scottish Government had not properly assessed the impact of emergency legislation on children, and that the parliament did not have before it the information necessary to conduct the level of scrutiny required to fulfil its role as a human rights guarantor. The findings of the Independent CRIA bore out these concerns.

When laying regulations under the ‘made affirmative’ procedure therefore, it is the Scottish Government’s obligation to demonstrate to the parliament that it has considered the nature and level of impact on children and young people’s human rights. Any regulations should always be accompanied by a CRIA, with the level of detail proportionate to the extent of impact. This is required to aid MSPs, in their role as human rights guarantors, to assess whether the restrictions are proportionate and necessary.

3. Children and Young People’s participation

Throughout the pandemic we have expressed our concern about the limited extent to which children and young people have been able to participate in decision making – not only having their voices heard but taken into account. The Independent CRIA found that this was a major failing of the initial pandemic response from the Scottish Government.

Our young advisers addressed this at their meeting with the Covid-19 Committee in August. Although we accept that the emergency situation at the start of the pandemic limited the extent to which participation was possible, there is now a significant amount of material which captures children’s views on the impact the pandemic and restrictions have had. This includes Lockdown Lowdown³, A Place in Childhood’s #ScotYouthandCovid⁴, as well as a wide range of policy work by organisations such as LGBT Youth Scotland⁵ and Who Cares? Scotland⁶. This information should be used to inform CRIAs, which in turn will support MSPs as they scrutinise emergency legislation.

In addition, as the Independent CRIA recommended, the structures within which we make decisions need to be fundamentally rethought in order to enable children to take an active role in their own lives and communities. The right to respect for the views of children requires a shift in the perception and treatments of children from that of passive objects in need of adult protection to active participants in decision

³ Young Scot, Youthlink & SYP. 2021. Lockdown Lowdown. <https://youngscot.net/ysobservatory/upqlc50dzkn0aa3eh0m14o2msaba1n>

⁴ A Place in Childhood. 2021. #ScotYouthandCovid2. <http://aplaceinchildhood.org/publications/#ScotYouthandCovid2>

⁵ LGBT Youth Scotland. 2021. How Covid-19 is affecting LGBTQIA+ Young People Living in Scotland. <https://www.lgbtyouth.org.uk/news/2020/how-covid-19-is-affecting-lgbtqiaplus-young-people-living-in-scotland/>

⁶ Who Cares? Scotland. 2021. Covid-19 Recovery Planning. <https://www.whocaresscotland.org/wp-content/uploads/2021/03/Covid-19-Recovery-Planning-Full-Report-Feb-21-1.pdf>

making processes affecting them at all levels of society. This includes the processes through which emergency legislation is developed, and parliamentary scrutiny mechanisms.

Conclusion

The Scottish Parliament's role in scrutinising 'made affirmative' regulations has developed over the last two years and we recognise that early in the pandemic, the parliament itself was grappling with the challenges of operating under Covid-19 restrictions.

In August 2021, the Commissioner, together with two of our Young Advisers, met with the Covid 19 Committee to discuss the ways in which the Committee could ensure that the human rights of children and young people were considered in their scrutiny of legislation. We welcome Parliament's proactive approach to its role as a human rights guarantor.

As recent developments have demonstrated, this pandemic is unpredictable and the situation can develop very quickly. It is therefore likely that the made affirmative procedure will require to be used again, however as with the restrictions it brings into force, it should only be used where it is proportionate and necessary. Adoption of the three recommendations we outline above would assist in ensuring this is so.

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