

## Proposed Restraint and Seclusion (Prevention in Schools) (Scotland) Bill Consultation Response

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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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### Summary

We welcome Daniel Johnson MSP's proposal for a Member's Bill on the use of restraint, seclusion and restrictive practices<sup>1</sup> in schools. Our office strongly agrees that children's rights in this area must be protected in law. While we understand why the consultation is limited to school settings, we have long argued that there is a need for a consistent legal framework covering restraint in all situations in which children are in the care of the State. Scottish Government should identify a suitable legislative vehicle to put this in place at the earliest opportunity.

### No Safe Place

In 2018, our office published *No Safe Place* – our investigation into restraint and seclusion in schools<sup>2</sup>. The investigation reflected our escalating concerns about the extent to which children, often very young, and often disabled, were experiencing restraint, sometimes to injury. We found that guidance at local authority level was inconsistent, with significant variations in practice. Four councils had no policies or guidance in place at all. This placed children at risk of inappropriate and unsafe practices which could result in serious injury. Only 18 councils recorded all incidents of restraint and seclusion, meaning that we were unable to understand the extent of the use of restraint across Scotland. National guidance, including on reporting and monitoring, was virtually non-existent.

### Human Rights framework

As our investigation report outlined, restraint, seclusion and restrictive practices engage a number of children's human rights under both the UNCRC and the European Convention on Human Rights (ECHR).<sup>3</sup> Inappropriate use of restraint can amount to "inhuman or degrading treatment or punishment" which is prohibited by Article 3 of the ECHR (the prohibition of torture). Article 3 is an absolute right, interference with which cannot be justified on any grounds. Both the UNCRC (Article 37) and UN Convention on the Rights of People with Disabilities (UNCRPD – Article 15) contain equivalent prohibitions on cruel, inhuman or degrading treatment or punishment. Article 8 ECHR, which includes the right to bodily integrity, and UNCRC

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<sup>1</sup> Uses of the word restraint in this submission should be read as including the full range of restrictive practices

<sup>2</sup> CYPCS. 2018. *No Safe Place*. <https://www.cypcs.org.uk/resources/no-safe-place/>

<sup>3</sup> European Convention on the Rights of the Child.

[https://www.echr.coe.int/documents/d/echr/convention\\_eng](https://www.echr.coe.int/documents/d/echr/convention_eng)

Article 18, which outlines the right to protection from violence and injury are also engaged.

There have been instances, in the UK and elsewhere, where inappropriate use of restraint has resulted in the death of a child<sup>4</sup>. In other cases, children have been seriously injured<sup>5</sup>. The necessity of appropriate guidance on the use of restraint therefore engages children's right to life in Article 2 of the ECHR and Article 6 of the UNCRC. The latter extends an obligation on states to "ensure to the maximum extent possible the survival and development of the child".

The test, derived from human rights standards, is that restraint should only ever be used as a last resort, to prevent an immediate risk of harm to the child or another person, using the minimum necessary force and for the shortest time possible.

Seclusion or isolation may not only amount to cruel or inhuman treatment but may also constitute an unlawful deprivation of liberty in terms of Article 5 ECHR, Article 37 UNCRC and Article 14 UNCRPD. Any statutory guidance must, therefore, include seclusion, including the use of "quiet rooms", "sensory rooms", "cool down spaces" etc. Although these spaces can be a valuable support for children who find school overwhelming, inappropriate or excessive use can be harmful and could breach children's human rights. They should only be used as part of a support plan and any use should be recorded to ensure it can be monitored and reviewed.

### **Disabled children's rights**

This bill must be considered in the context of the human rights of disabled children. In the absence of accurate recording of the use of restraint, it is not possible to identify what proportion of incidents involve a disabled child. However both our own investigation and the work of others indicates that a substantial proportion are disabled. Specific groups of disabled children are disproportionately likely to experience restraint, particularly those with a learning disability, autistic children and those with other neurodivergent conditions. It is therefore important to consider this proposal in the context of both the UN Convention on the Rights of People with Disabilities (UNCRPD) and the Equality Act 2010.

In 2020, the First Tier Tribunal for Scotland's Health and Education Chamber considered a referral from a disabled child who had been subject to physical restraint by between three and five members of staff on at least 13 occasions. The periods for which the child was restrained varies from 5 to 35 minutes and on one occasion she was restrained three times on the same day, for a total of over an hour. As highlighted in the decision, the child was injured on at least two occasions and the type and duration of the holds represented a significant risk to her health. The Tribunal found monitoring forms had "critical omissions and inconsistencies which leads us to question how levels of restraint are measured and evaluated".<sup>6</sup> The Tribunal agreed with the child that "the preventative strategies intended to avoid restraint were inadequate or static" and found no evidence that the school engaged in tailored preventative work. The Tribunal concluded that the child had been discriminated against, in terms of the Equality Act 2010, on the basis that she was

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<sup>4</sup> For example, the deaths of Gareth Myatt and Adam Rickwood

<sup>5</sup> As outlined in evidence gathered by Beth Morrison

<sup>6</sup> Health and Education Chamber, First Tier Tribunal for Scotland. 2020. P17

[https://www.healthandeducationchamber.scot/sites/default/files/decisions/add/ASN\\_D\\_%2014\\_01\\_2021.pdf](https://www.healthandeducationchamber.scot/sites/default/files/decisions/add/ASN_D_%2014_01_2021.pdf)

treated unfavourably because of the distressed behaviours arising as a consequence of her disabilities<sup>7</sup>.

Given this background, it continues to disappoint us that the Scottish Government, and as a result education authorities and schools, persist on considering restraint a behaviour management issue, rather than seeing it in the context of the support needs of disabled children. Our view is that this approach results in missed opportunities to properly consider the needs underlying distressed and dysregulated behaviour and can, as happened in the Tribunal case above, result in discrimination against these children and multiple breaches of their rights.

The Equality and Human Rights Commission's (EHRC) inquiry into the use of restraint in England and Wales also suggested that other groups, particularly children from an ethnic minority background, are also disproportionately likely to be restrained<sup>8</sup>.

### **Statutory protection**

The ECHR places a positive obligation on states to ensure that there is an appropriate legislative and administrative framework to protect human rights and to ensure that any interference meets the test of being lawful, necessary and proportionate. Given the seriousness of the potential interference in children's human rights involved in restraint, seclusion and other restrictive practices, our view is that this obligation can only be fulfilled by a legal framework including statutory guidance.

Teachers and school staff have no express power in law to restrain a child and can only do so lawfully in discharge of their duty of care (which must itself be exercised consistently with the requirements of the ECHR and UNCRC). The absence of consistent national or local guidance therefore loads all the responsibility for navigating these complex decisions on the shoulders of staff, and places them and children at significant risk.

Statutory provision must set out clearly the law as it relates to use of restraint and seclusion. It must also make provision for staff to be entitled to the training, supervision and other supports necessary to ensure rights-compliant practice, as well as consistent national recording and monitoring of incidents.

In our investigation, we found broad variations in practice and monitoring of the use of restraint, including in some cases an absence both of guidance and monitoring. As the Health and Education Chamber state in the decision referenced above: "Accurate reporting is an important procedural safeguard"<sup>9</sup>.

It is vital to ensure that when restraint occurs, its use is reviewed and used to inform planning, preventative work and staff training. Effective training that focusses on de-escalation will reduce the risk that restraint occurs and, in the rare event that restraint is required to protect the child or someone else, ensure that it is safe for the child and any staff who are involved.

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<sup>7</sup> Ibid. p1

<sup>8</sup> EHRC, 2021. *Restraint in schools inquiry: using meaningful data to protect children's rights*. <https://www.equalityhumanrights.com/sites/default/files/inquiry-restraint-in-schools-report.pdf>

<sup>9</sup> Ibid. p17

As the EHRC note, restraint does not require the use of physical force and may include indirect acts of interference<sup>10</sup>. It can include the removal of mobility equipment or other means of preventing a child from moving. The use of restraint for non-therapeutic reasons in equipment such as wheelchairs and seating systems (i.e. Heathfield chairs) should also fall within the scope of the guidance.

### **Other settings**

Children do not experience restraint differently in settings other than schools. Whether in residential child care, in mental health settings or in secure care and justice settings, the impact of restraint and the inherent risks are the same. This bill, and our investigation, focus on the need for statutory guidance in relation to the use of restraint in schools. However our subsequent work on this issue, including with children and young people, have highlighted the need for statutory guidance across all sectors where children may experience restraint.

Earlier this year the UN Committee on the Rights of the Child published its most recent set of Concluding Observations. It called on the Scottish Government to

- *“Regularly collect, analyse and publish disaggregated data on the use of stop-and-search checks, harmful devices, seclusion, restraint, solitary confinement and isolation on children;*
- *“Take legislative measures to explicitly prohibit, without exception, the use of... (iii) solitary confinement, isolation, seclusion and restraint as disciplinary measures in schools and alternative care and health settings;*
- *“Develop statutory guidance on the use of restraint on children to ensure it is used only as a measure of last resort and exclusively to prevent harm to the child or others, and monitor its implementation;*
- *“Explicitly prohibit the use of restraint and seclusion in educational settings and adopt a child rights-based approach to addressing violence or other disturbances in schools, including by prohibiting the presence of police in schools and providing regular training for teachers on relevant guidance for addressing such disturbances in a child-sensitive manner”*

In addition, the UN Committee on the Rights of Persons with Disabilities, in its last review of the UK in 2017, called on the Scottish Government to:

- *“Adopt appropriate measures to eradicate the use of restraint for reasons related to disability within all [...], as well as practices of segregation and isolation that may amount to torture or inhuman or degrading treatment;*
- *“Set up strategies, in collaboration with monitoring authorities and national human rights institutions, in order to identify and prevent the use of restraint for children and young persons with disabilities.”*

We call on Scottish Government to not just support the current proposed Bill but to bring forward national human rights based legislative standards, guidance, recording and monitoring of restrictive practices across all settings.

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<sup>10</sup> EHRC, 2019. *Human Rights framework for restraint.*

<https://www.equalityhumanrights.com/sites/default/files/human-rights-framework-restraint.pdf>