

## Coronavirus (Scotland) Bill MSP Briefing

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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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### Key messages

- Children and young people's human rights must underpin all decisions taken to introduce new law, policy and practice guidance in Scotland in response to the Covid-19 global pandemic.
- It is legitimate for the Scottish Government to seek emergency powers provided that they are **lawful, necessary, proportionate** and **time limited** to safeguard children and young people's rights in accordance with international human rights law and principles.
- The exercise of some of these emergency powers will necessarily negatively impact on children's human rights, particularly for those children who are deprived of their liberty.
- Scottish Government must ensure ongoing assessment of impact through robust Children's Rights Impact Assessments.
- Scottish Government must put in place adequate monitoring and scrutiny of implementation of the emergency provisions and the use of these powers.
- The Scottish Parliament must ensure it continues to act as a human rights guarantor.
- Scottish Government should issue specific human rights-based guidance and, if necessary, direction to ensure that children's human rights continue to be protected when these are powers are used
- Scottish Government should amend the draft bill and associated provisions and guidance to ensure that every person under the age of 18 is defined as a 'child', in accordance with the UNCRC

### Briefing

As we acknowledged in our briefing on the Legislative Consent Motion regarding the (UK) Coronavirus Act 2020, the Covid-19 pandemic poses unprecedented challenges for public services and for society as a whole. We commend the Scottish Government and Scottish public services, particularly the NHS, for their responses to the crisis thus far and the clarity with which messages about the importance of rights to life and to health are being communicated to all parts of Scottish society, including children and young people.

As we outlined in our previous MSP Briefing<sup>1</sup>, International human rights frameworks acknowledge the need for flexibility in times of national emergency. We recognise that the Scottish Government must take on some emergency powers in order to protect public health and to address the challenges the pandemic presents. We welcome the steps taken to date by the Scottish Government to protect the rights of children and young people, for example in ensuring continued access to social security (including free school meals) and education.

The (UK) Coronavirus Act 2020 (the UK Act) transferred significant powers to the UK and Scottish Governments and has the potential effect of temporarily overturning and/or bypassing a number of human rights protections established in law by the UK and Scottish Parliaments. Use of these powers must be carefully considered and justified to ensure that they are compliant with Scotland's obligations under international human rights law. We welcome the commitment 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."*

The same concerns apply to many of the provisions in this Bill, which would impact on children's human rights under the European Convention on Human Rights (ECHR) and the UNCRC. They must only be used where absolutely necessary and proportionate.

We question whether the case has been made out for all of the provisions set out in the Bill to come into force straight away. The Government's CRWIA does not adequately or fully set out the human rights impact of these provisions and the Policy Memorandum does not provide sufficient evidence that all of these changes to existing law are necessary at the present time, referring instead to the possibility that they might be. We should not relax rights protections merely in anticipation of a situation that might arise at some point in the future.

We suggest therefore that the provisions in this Bill should be drafted so as to be capable of being brought into force individually by regulations, subject to tests of necessity and proportionality. This could be done through amendment of Section 10 of the Bill and would ensure that the Parliament is able to fulfil its role as a human rights guarantor.

In times of national emergency, Parliament has a key role in scrutinising the exercise of executive power, as well as the significant changes to practice and service delivery currently affecting children and young people across Scotland. We note that some legislatures are using technology to facilitate remote or virtual meetings and have convened specific Coronavirus committees to monitor the response of public authorities to the pandemic. We would very much welcome consideration of these and other approaches by the Scottish Parliament.

We recognise the need for public authorities to be able to respond flexibly to the challenges facing them. However, human right standards are not subject to local discretion. We therefore seek assurance from Scottish Ministers that, where the

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<sup>1</sup> Attached

provisions in this bill or within the 2020 Act are required to be in force, they issue specific guidance and, if necessary, direction to public authorities to ensure that the intention to protect the human rights of children in Scotland, expressed by the First Minister and other Scottish Ministers, is not lost through application of variable local practice.

It is at times where human rights protections are relaxed that transparency and scrutiny of the use of these powers is most important. We are concerned by the provisions in the bill which have the potential to restrict that scrutiny, for example increased timescales for response to Freedom of Information requests and the ability to exclude the public from meetings of public bodies. Whilst we acknowledge the need for some flexibility, we expect the use of these provisions to be limited and proportionate and ask that processes be put in place to monitor and report on their use.

### **Definition of a child**

Our office has consistently raised concerns about the incompatibility of the existing definition of a child in Scots law with the UNCRC. The UN Committee on the Rights of the Child has repeatedly called on Scottish Government to bring this in line with the Convention. We are disappointed that this discrepancy was perpetuated in the UK Act. This means 16- and 17-year olds from Scotland are excluded from important protections that Act provides to their peers elsewhere in the UK. Likewise, the provisions relating to children in section 7 of The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 do not apply to children aged 16 and 17, meaning that 16 and 17 year olds in Scotland are at significantly greater risk of being fined or criminalised than those elsewhere in the UK. These protections should be urgently extended to all children aged under 18 years old age, to ensure Scotland meets its international human rights obligations.

### **Protections from eviction (Schedule 1)**

We welcome the introduction of protections from eviction for private residential tenants. This group includes some of the most disadvantaged children and young people in Scotland, including families experiencing poverty and care-experienced young people. Whilst we welcome the protections offered by the Bill we are concerned that the provisions in Schedule 1 section 2(3A)(iii – v), which provide for shorter notice periods, may disproportionately affect particularly vulnerable groups of children, including those experiencing domestic abuse, and care experienced young people.

We are also concerned that these protections do not apply to notices for eviction issued prior to the commencement of this bill. It is essential that these protections be extended to those with existing notices to ensure that existing orders cannot be given effect to for the duration of the emergency period.

### **Children's Hearings, Looked After Children (Schedule 3)**

The Children's Hearing is a legal tribunal which makes decisions that can have far reaching consequences for children and young people. These children are entitled to the highest standards of human rights protections, particularly in the current emergency situation. The provisions in the Bill relating to Children's Hearings make significant changes to the operation of the system and to legal provisions which exist

to protect children's human rights including Article 5 ECHR (deprivation of liberty), Article 6 (fair process) and Article 8 (respect for family life).

We draw attention in particular to the extension of timescales for emergency placements into secure care accommodation, for Child Assessment Orders (CAOs) and for Child Protection Orders (CPOs). In each of these cases, the time for which a child might be deprived of their liberty and separated from their family without the opportunity for that decision to be reviewed by a court or tribunal is extended. The extension of appeal timescales for CPOs provides a measure of additional protection but only if the child and Relevant Person are legally represented, otherwise it places undue burden on the child to act to protect their own rights.

While we can foresee circumstances in which these extended timescales might be required, we are concerned that the Government has not made the case that these proposed changes are necessary and proportionate at this time.

We believe that the Scottish Government should be seeking to reduce the number of children in secure care at this time. Children who are deprived of their liberty or are otherwise detained in any setting are at an increased risk of significant harm from Coronavirus.

Additionally, we believe that some of the provisions do not sufficiently recognise the importance of children's rights to participate in decision making (Article 12 of the UNCRC) and to fair process (Article 6 of the ECHR). This is particularly the case in relation to the proposal to remove the requirement on local authorities to carry out reviews of placements (Section 10). We question how the Chief Social Work Officer is to make a decision on what is in the child's best interests in the absence of an assessment that would include seeking the child's views and whether this would further violate child's human rights.

We welcome increased use of electronic means to support attendance at Children's Hearings but note that for children to benefit from this it is dependent on availability of technology and support from professionals and this must be prioritised. There should be a presumption that no hearing should proceed unless all possible steps have been taken to provide the child with an opportunity to participate. We believe that the availability of advocates and legal representation, including via legal aid, is necessary to mitigate this.

Children's rights must always be a priority for those in power. In this time of crisis the Scottish Government is having to make difficult decisions. A rights-based approach is essential to good decision making, and so is the role of the Scottish Parliament as a human rights guarantor.

It is essential that Scottish Ministers continue to provide 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. This is just part of the wider role that the Scottish Parliament will play as a human rights guarantor to ensure that children's rights are properly respected, protected and fulfilled.

For further information, please contact Megan Farr, Policy Officer at [megan.farr@cypcs.org.uk](mailto:megan.farr@cypcs.org.uk)

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