

Coronavirus (Scotland) (No.2) Bill

Stage 1 Debate

Briefing by the Children and Young People's Commissioner Scotland

Key points

- **Scottish Government should exclude all children and young people under the age of 18 from the criminal justice provisions of this Bill**
- **Scottish Government should undertake and publish a Children's Rights (and Wellbeing) Impact Assessment and an Equalities and Human Rights Impact Assessment for all new emergency legislation, policy and guidance**
- **The Bill should include an increase to the Young Carer Grant in order to ensure support for children and young people playing caring roles**
- **The Bill should amend The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 to prevent the unnecessary criminalisation of 16/17 year olds via Fixed Penalty Notices**

Briefing

The Covid-19 pandemic has created unprecedented challenges for public services and for society as a whole. We commend the enormous efforts being made by public services and civil society organisations across the United Kingdom. However, the pandemic and the restrictions put in place to combat it are having a disproportionate impact on children, and particularly on those children whose rights are already most at risk.

We acknowledge the necessity of introducing some further emergency legislation at both UK and devolved level. Some of these measures have introduced important safeguards, for example protecting children and their families from eviction, or in this Bill permitting students to terminate their tenancies.

However there remain concerns about whether other proposed measures are strictly necessary. International human rights frameworks recognise States' need for flexibility in a time of national emergency, as acknowledged in Article 15 of the ECHR¹ and Article 4 of the ICCPR,² but these powers must be **lawful, necessary, proportionate and time limited.**

¹ European Convention on Human Rights

² International Covenant of Civil and Political Rights

Human rights treaties emphasise the importance of ensuring the rights of the most vulnerable members of society, including children and disabled people, continue to be respected, protected and fulfilled during national emergencies. International human rights bodies have issued a significant amount of guidance to States specifically in relation to the current pandemic.³ The United Nations Committee on the Rights of the Child warns of the grave physical, emotional and psychological effect of the COVID-19 pandemic on children and calls on States to protect the rights of children.⁴ The European Network of Ombudspersons for Children has issued a statement to European governments and Intergovernmental organisations highlighting key concerns.⁵

Assessment of human rights impact

While the Policy Memorandum to this Bill includes a welcome consideration of human rights in terms of the European Convention on Human Rights (ECHR), we are concerned that there has been very little evidence of the use of Children's Rights Impact Assessments (CRIAs) as legislative provisions have been developed. We strongly encourage the Scottish Government to prioritise use of CRIAs in order to ensure that the impact of legislation on children is properly and fully considered. We note that a number of the provisions in this Bill impact on children and young people (see below).

Carers Allowance

We are supportive of the increase in carers' allowance, which will provide additional and much needed support for families, but note that it will not be provided to young carers, who currently receive financial support via Social Security Scotland. The pandemic continues to have a significant impact on young people with caring responsibilities and many young carers will be supporting a disabled adult who is shielding, who themselves have been disproportionately impacted by lockdown measures.

In 2016, our office commissioned research into the views and experiences of young carers in Scotland. Their experiences are summed up by the title of the report: "*Coping is difficult but I feel proud*".⁶ Young carers reported that they often felt forgotten in decision making processes and that they were reluctant to engage with social work due to a fear of child protection interventions and due to the stigma and shame of being a young carer. This resulted in a barrier to them fully realising their rights under the UNCRC. Overall, negative impacts were associated with higher levels of caring responsibility.

Young carers require direct support in their own right to help mitigate the impact of the pandemic on them and on those they are caring for. The Young Carer Grant should be increased by amendment to the relevant regulations, in order to provide these children and young people with the necessary additional support.

³ <https://cypcs.org.uk/coronavirus/international-statements>

⁴ https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/1_Global/INT_CRC_STA_9095_E.pdf

⁵ <https://cypcs.org.uk/wp-content/uploads/2020/04/ENOC-Bureau-statement-on-CR-in-the-context-of-the-COVID-19-outbreak-FV.pdf>

⁶ <https://www.cypcs.org.uk/ufiles/CopingWithCaring.pdf>

Criminal proceedings extension of time limits and Deprivation of liberty

The proposed amendments to criminal proceedings will impact on children who are in conflict with the law. This includes children under 18, who are still liable for prosecution for certain offences (1,776 children were prosecuted in 2017/18) ⁷, notwithstanding the jurisdiction of the children's hearings system over most juvenile offending.

Schedule 2, Part 1 of the Bill proposes to amend sections 200 and 245J of the Criminal Procedure (Scotland) Act 1995, to remove the requirement that no single period of remand or committal to a hospital can exceed three weeks, and to provide that where an offender fails to comply with one of a range of orders, the court can adjourn the case for up to 4 weeks, or, on cause shown, 8 weeks at a time.

Extensions to the period of time for which individuals will be deprived of their liberty must be measures of last resort and for the shortest period of time necessary in order to comply with the requirements of Article 5 and 6 ECHR. Children are particularly in need of additional legal protection, and extended time periods that may be proportionate and justifiable for adults cannot be assumed to be so for children. We see no evidence that children's rights have been given any particular consideration by the Scottish Government in terms of the additional safeguards required.

The UN Committee on the Rights of the Child on 8th April 2020 urged member States to take measures to “prevent the arrest or detention of children for violating State guidance and directives relating to COVID-19, and ensure that any child who was arrested or detained is immediately returned to his or her family.”

We would recommend that the Scottish Government provides assurances that all children under the age of 18 will have the protection of international human rights safeguards during the coronavirus pandemic, and specifically exclude all children and young people under 18 from these emergency provisions relating to criminal justice.

Criminalisation of 16/17 year olds

Our office has consistently raised concerns about the incompatibility of the existing definition of a child in some areas of Scots law with the UNCRC, and 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) Coronavirus Act 2020 and in subsequent Scottish legislation. This means 16 and 17 year olds from Scotland are treated as ‘adults’ and therefore excluded from important protections that Act provides to their peers elsewhere in the UK.

While amendment of UK legislation is outwith the competence of the Scottish Parliament, an amendment to section 9 of The Health Protection (Coronavirus)

⁷ <https://cycj.org.uk/wp-content/uploads/2020/01/Rights-Respecting-Scotlands-approach-to-children-in-conflict-with-the-law.pdf>

(Restrictions) (Scotland) Regulations 2020 could remove the possibility of a 16/17 year old child being issued with a Fixed Penalty Notice and subject to the long-term implications of having a criminal record, for breaching lockdown restrictions. This would go some way to mitigating the impact of the UK provisions and towards compliance with the requirements of the UNCRC.

Children and Young People's Commissioner Scotland

12 May 2020