

Return to School Planning: A human rights briefing paper for the Education Recovery Group and other education decision makers

Purpose

The purpose of this paper is to support the work of the Education Recovery Group and other key stakeholders by providing a human rights-based framework to guide decision making, and to raise some key questions and recommendations for consideration.

Summary of key points

In exceptional cases, such as where public health is at risk, human rights law allows for measures that may restrict the enjoyment of human rights

These restrictions must be lawful, necessary, proportionate and time limited

Education is a human right, and must be available, accessible, adaptable and acceptable

There is a duty on the state to use the maximum resources to the fullest extent possible to secure the delivery of rights

School closures impact on a wide range of human rights, not just [the right to education](#). Rights to enough nutritious food, to the best mental health possible and to relax and play, along with many others.

Decisions on re-opening of schools must be taken in line with the legal tests, ensure provision of education in line with international standards, and consider the impact on children's rights beyond just education

Children and young people must be properly and fully involved in decision making

Introduction

On the advice of the Scottish Government, Scotland's schools closed for the majority of children on 20th March 2020. Since that time, government officials, local authority staff, teachers, classroom assistants, parents and carers have been doing incredible work to support children's education. It is no criticism of that commitment, creativity and effort to acknowledge that the negative impacts of being out of school have been profound for many children.

Since the beginning of the pandemic my office has been raising concerns about the impact of school closures on children's human rights, and the need for the Scottish Government to put in place mitigations to tackle issues such as poverty and digital exclusion.

On 8th April 2020, the UN Committee on the Rights of the Child (CRC) warned of the "grave physical, emotional and psychological effect of the COVID-19 pandemic on children". The UN Committee called on States to focus on 11 key areas. These include a number of considerations directly and indirectly relevant to decisions around returning to formal education:

- Consideration of the health, social, educational and recreational impacts of the pandemic on the rights of the child
- Explore alternative and creative solutions for children to enjoy their rights to rest, leisure, recreation and cultural and artistic activities
- Ensure that online learning does not exacerbate existing inequalities or replace student/teacher interaction
- Activate immediate measures to ensure children are fed nutritious food
- Define core child protection services as essential and ensure they remain functioning and available including home visits when necessary, and provide professional mental health services for children living in lockdown.
- Protect children whose vulnerability is further increased by the exceptional circumstances caused by the pandemic.
- Provide opportunities for children's views to be heard and taken into account in decision-making processes on the pandemic.

Our office has echoed those concerns in public statements and in our evidence to the Scottish Parliament's Education and Skills Committee, the Parliament's Justice Committee¹, and the UK Parliament's Joint Committee on Human Rights², as well as in meetings with officials and with Ministers. We also joined with Children's Commissioners across Europe³ in calling for states to support their children and families to create a home environment conducive to providing education and without putting additional pressure on families. This included a need for measures relating lack of IT equipment, inadequate internet connection, home working parents, access to reading materials, and disparities in learning and literacy levels.

Throughout the lockdown we have been speaking with children and young people and working with civil society partners to monitor the impact on children's rights and to seek to ensure their views are properly taken into account. For example, the Lockdown Lowdown survey conducted by the Scottish Youth Parliament, Young Scot and YouthLink⁴ reported that over two fifths of children and young people (42%)

1 <https://cypcs.org.uk/coronavirus/our-coronavirus-work/education-and-skills-committee-evidence-of-the-children-and-young-peoples-commissioner-scotland-on-reopening-of-schools-vulnerable-children-and-the-2020-exam-diet/>

2 <https://cypcs.org.uk/coronavirus/our-coronavirus-work/evidence-to-joint-committee-on-human-rights-inquiry-on-the-governments-response-to-covid-19-human-rights-implications/>

3 <http://enoc.eu/wp-content/uploads/2020/04/ENOC-Bureau-statement-on-CR-in-the-context-of-the-COVID-19-outbreak-FV.pdf>

4 <https://www.youthlinkscotland.org/media/4486/lockdown-lowdown-final-report.pdf>

stated that they were 'extremely' or 'moderately' concerned about school, college and university closures. Almost two fifths (39%) stated that they felt 'moderately' or 'extremely' concerned about their own mental wellbeing. The Children's Parliament also conducted a survey⁵ and found that nearly one-third of children reported being worried about learning from home.

Covid-19 and the restrictions put in place to address it are affecting children of all ages, from the need for maternity and early years support through to those older children moving on to work, apprenticeships, or further and higher education. This paper is primarily focused on the impact of school closures and the plans for future schooling. We will be providing additional information on how Covid-19 has impacted on other elements of children's lives in coming weeks through a comprehensive Children's Rights Impact Assessment.

At the time of writing, lockdown measures are beginning to ease but Scotland is still in the midst of an education emergency and things are a long way from being back to normal.

As we move out of lockdown, it is necessary to stay focused not only on education but on the wider impacts on children of closure and return to school. While much attention is focused on 11 August, there is a need to ensure provision is in place to support families over the summer, particularly as parents return to work. Scotland needs to use this period to design supports that will last into the future and which take a much more holistic view of what encompasses a rights respecting model of educational provision.

Decisions made now will have a life-long impact on a generation of children. The pandemic has highlighted and further entrenched existing inequalities and tackling this will require long term plans, not short term solutions. The United Nations Convention on the Rights of the Child (UNCRC) requires that the state undertakes all appropriate legislative and administrative measures for the implementation of all the rights recognised in the UNCRC. The UNCRC also requires the use of all available resources to the maximum extent possible in meeting children's economic, social and cultural rights.

The decision to close schools, and the ongoing decision making on providing a significantly reduced in-school programme must be clearly evidenced by the Scottish Government, local authorities, schools and other educational establishments as necessary and proportionate. The Scottish Government and others must also show how they are addressing the significant impact on children's education rights, and other rights, by using all available resources to the maximum extent. Children and young people's rights and their voices must be at the heart of this decision making.

The Scottish Government has made a commitment to protect the rights of all children in Scotland by incorporating the UNCRC into Scots law and needs to show leadership - as it has done with the NHS over the last three months - and a fully

⁵ https://www.childrensparliament.org.uk/wp-content/uploads/How_are_you_doing_Results_April_May_2020_Childrens_Parliament-Updated.pdf

resourced commitment to build back better. Whilst economic recovery is important, the focus on children must be paramount if we are serious about our commitment to make sure Scotland is the best place for children to grow up.

Right to an education (Article 28 UNCRC)

The UNCRC places obligations on the State (i.e. the Scottish Government) to ensure that the right to education of all children in its jurisdiction is realised (Article 28). The right is a broadly defined one. In relation to formal education UNESCO has adopted the International Standard Classification of Education which is:

“A coherent set or sequence of educational activities or communication designed and organised to achieve pre-determined learning objectives or accomplish a specific set of educational tasks over a sustained period”

The First Special Rapporteur on the Right to Education, and the Committee for Economic Social and Cultural Rights (CESCR in its General Comment 13) framed the essential qualitative elements of education as “the 4 As”:

- Availability – making full use of available resources including financial and human
- Accessibility – based on principles of non-discrimination, physical and economic accessibility
- Acceptability – taking account of local culture
- Adaptability – taking account of the changing nature of society and the diverse needs of children

Availability

Children have not been in school and contact with teachers has been limited, while parents have struggled to support children’s learning. We note the proposal to re-open schools but to limit the time children are in the classroom to enable physical distancing to take place. The CRC has recognised that contact with teachers is an important element of availability of education and has been critical of states which provide only for limited school attendance. While it is important to note the context of the current public health risk, there still an expectation that any limitation on contact time (and therefore the availability of education) is kept to a minimum and that every effort is made to mitigate the impact using other means of providing education to children. This will necessarily require maximum use of available resources at state and local level (Art 4 UNCRC).

Accessibility

During the pandemic, great reliance has necessarily been placed on technology to make education accessible. While this has worked for some children, significant numbers of children, particularly those living in poverty, and those with disabilities and other Additional Support Needs, have experienced digital exclusion and have

not been fully supported to access education. In relation to blended learning, there is a need to consider children as individuals with their own needs and preferences. This should already be taking place through existing frameworks for assessment and planning to meet children's needs in education. We note the comments of the UN Special Rapporteur on Education in her report to the Human Rights Committee on the impact of the COVID-19 crisis on the right to education⁶. Among her recommendations is a warning that digital education should only be seen as "...a temporary solution aimed at addressing a crisis. The digitalization of education should never replace onsite schooling with teachers." She also warns of the risk that private actors may seek to profit from the crisis and any involvement of private companies in the delivery of education must be tightly controlled in line with existing standards.

Acceptability

This requires that the content of education and teaching methods is relevant culturally appropriate, and of good quality. This links closely to the purposes of education set out in Article 29 of UNCRC which includes the development of a child's personality, talents and mental and physical abilities to their fullest potential. The impact on the quality of education for children during lockdown is self-evident, and current provisions for blended learning being proposed raise serious questions about acceptability.

An important aspect of the quality of education is key relationships. Our 2015 study on *How Young People's Participation in Schools Supports Achievement and Attainment*⁷ highlighted that the relationships pupils valued most significantly appeared to be those with staff they could approach and trust, who gave respect and were respected in turn by pupils. There were staff members in these schools who worked hard for young people's wider development for whom attainment was a goal, but never the only goal. Similarly, pupils' rights experiences were lived through relations: addressed in the links schools made between core and extended curriculum, between school and community, between adults and pupils. Relations in all four arenas and between different interested parties (pupils, community members, and teachers) needed to be respectful, trusting, yet challenging to ensure achievement and attainment was supported. Supportive relations within a rights-based education made possible the kinds of participation pupils valued. The opportunity to participate in purposeful practices – activities found across all school life – was also significant.

Adaptability

There is therefore a need to ensure that the educational "offer" made to children as Scotland navigates its way out of the pandemic is sufficiently adaptable, making use of a wide range of options based around the needs of individual children so far as possible. A rights-based education, built upon supportive relationships, with strong

⁶ <https://www.ohchr.org/en/issues/education/sreducation/Pages/SREducationIndex.aspx>

⁷ <https://www.cypcs.org.uk/ufiles/achievement-and-attainment.pdf>

participation and peer-to-peer support from other children and young people is the best way to help develop children to their fullest potential.

We suggest that the Scottish Government and other decision makers formally adopt the “4 A’s” model to guide their decision making on compliance with Articles 28 and 29 of the UNCRC.

Content of education (Article 29 UNCRC)

The UNCRC not only provides for a right to education, but also sets minimum expectations of what that education should include (Article 29 of the UNCRC). The emphasis is on ensuring children receive a balanced well-rounded education which addresses all facets of development, rather than simply preparing the child to gain employment. This requires the development of a child’s “personality, talents and mental and physical abilities to their fullest potential”. As the CRC notes in its General Comment No.18, these aims are “...all linked directly to the realization of the child’s human dignity and rights, taking into account the child’s special developmental needs and diverse evolving capacities.”

The right to education is about the development of a child’s unique personality, talents and abilities, and goes beyond formal education to embrace the broad range of life experiences and learning processes. Schools play a major role not just in the formal education of children, but in their wider development through interaction with their peers and developing an understanding of themselves and the world around them.

Wider human rights considerations

Human rights are inter-related and interdependent. This is illustrated through a recognition that schools are not just places of education – they are places where children play, socialise, eat, and access supports that keep them safe. That means the decision to close schools impacted negatively on a wide range of children’s rights. As Professor Aoife Nolan notes in her paper for the Scottish Parliament’s Education and Skills Committee⁹:

“...loss of access to school meals has had an impact on many children’s right to adequate nutritious food (Articles 24 and 27 UNCRC). For children living in poor quality housing, school closures and lockdown have resulted in their spending extensive time in conditions inconsistent with their right to a standard of living adequate for their development (Article 27 UNCRC). Increased social isolation has had detrimental effects on children’s enjoyment of the right to the highest attainable standard of mental health (Article 24 CRC), while school closures have increased children’s exposure to a wide

⁸ <https://www.refworld.org/docid/4538834d2.html>

⁹ https://www.parliament.scot/S5_Education/General%20Documents/20200608Professor_Aoife_Nolan.pdf

range of threats, from parents, carers and others, as well as online. This runs contrary to their right to freedom from all forms of violence, injury or abuse (Article 19 UNCRC). School closures have, together with the lockdown situation, also impacted on children's rights to play (Article 31 UNCRC), freedom of association (Article 15) and the right to seek, receive and impart information (Article 13). The impact on all children has not been equal: poor, disabled and socially vulnerable children suffered disproportionately from school closures. This raises questions about whether the government has guaranteed these rights for all children without discrimination (Article 2 UNCRC)."

In addition, the rights of children with disabilities (Article 23 UNCRC) have been substantially impacted as the supports that should normally be provided through schools have been limited and in some cases entirely absent.

It is essential when considering children's rights that we consider the obligation on the state to properly support parents. Article 18 of UNCRC gives parents the primary responsibility for the upbringing and development of their children but makes it clear that governments must recognise parental responsibilities and provide resources and support to help them fulfil their responsibilities. This includes the development of institutions, facilities and services for the care of children and making sure that working parents have the right to benefit from child-care services and facilities. Many parents and carers have been placed in an impossible position of trying support their children's learning while also managing child-care of other children and work commitments. The failure to properly support parents, has a direct impact on their children's right to education.

Decision makers including the ERG will need to consider the impact on all of these rights at every step on the road out of lockdown and in the longer-term plans put in place to ensure Scottish education is built back better.

Duties on the State

These are not simply matters of policy or of aspiration. The State has a legal duty to ensure the realisation of the right to education. That means the Scottish Government must use all available resources to the maximum extent possible to:

- Respect - not interfere with children's right to education
- Protect - prevent anyone else from interfering in that right
- Fulfil - take all appropriate legislative, administrative, budgetary, judicial and other actions to secure the right

Whilst the Scottish Government has chosen to devolve the operational delivery of education to local authorities, the ultimate legal responsibility remains with Scottish Ministers. This responsibility cannot be delegated to local authorities, schools, teachers or parents.

The Government must make clear to councils, schools and more importantly children what the expectations are as schools re-open, it must put in place mechanisms to ensure setting and compliance with minimum standards, and it must ensure that the necessary resources are available, by moving them from other areas if required. This was successfully accomplished in relation to the provision of health services at the outset of the pandemic and the same prioritisation should now be applied to education. That will require a rights-based approach to budgeting be adopted.

We note that domestic legislation reflects this Ministerial role. There is a long-standing and broadly drafted power in section 2 of the Education (Scotland) Act 1980, which states:

“The (Scottish Ministers) may make regulations prescribing the standards and requirements to which every education authority shall conform in discharging their functions under section 1 of this Act ...”

Section 1 sets out the basic duty of education authorities to secure that there is made for their area, adequate and efficient provision of school education. Should it prove necessary, Ministers would be expected to make use of this power to ensure children’s rights to education were respected, protected and fulfilled.

There is no doubt that closure of schools in a pandemic can be justified in human rights terms in order to protect rights to life and health. The Government would have been justified in making an order to that effect using the powers in the Coronavirus Act 2020. No Education Closure Direction was made however, which meant the necessity and proportionality of that decision was not scrutinised by the Parliament and the power to derogate from local authority duties to provide education was not utilised. The only current legal limitation is where a duty cannot be performed as a result of an Education Continuity Direction.

The Coronavirus Act 2020 (Schedule 17, Section 11) provides Scottish Ministers with the power to make Educational Continuity Directions to ensure the ongoing delivery of children’s rights to education. Two directions have been made so far but neither includes independent providers, meaning there is a discrepancy between children in state education and those in private provision,

In order to comply with its own obligation to respect the right to education, the Government must ensure, on an ongoing basis, that measures which restrict or interfere with the right to education are lawful, necessary, proportionate, time-limited, and take into consideration the disproportionate impact on marginalised or vulnerable groups of people. Any such restrictions should also reflect the principle of the best interests of the child, set out in article 3(1) of the Convention. This requires a careful risk assessment focused on the wide-ranging impacts of this course of action on children’s interests.

The decision to reopen schools therefore also needs to take proper and full account of all those human rights considerations. It also requires acknowledgement that even a return to full-time attendance at school will not mean “back to normal”. It will not signify the end of either education recovery or the impact of the pandemic and school closures on children. We set out below some specific issues the ERG will

need to consider.

Rights to life and health (Article 6 UNCRC)

Professor Nolan sets out the need to consider that “...reopening of schools in the absence of adequate risk mitigation and protection measures raises clear threats to children’s right to the highest attainable standard of health, and – in a small number of cases – may jeopardise their right to life, survival and development (Article 6 UNCRC). Furthermore, given that the health risks faced by certain groups of children are higher than for others (such as children with underlying health conditions), questions of non-discrimination and the requirement that states take targeted measures to protect children in vulnerable situations during COVID-19 also arise.¹⁰” It is important to remember that these considerations also apply to school staff, especially those at higher risk (Older people, BAME, those with underlying health conditions) whose rights to life and health must also be protected.

Rights to participation (Article 12 UNCRC)

The state must facilitate children’s right to express their views freely in all matters affecting them. This right recognises that children don’t have the same economic or political power as adults and therefore there is an additional obligation on the state to involve them in decision making. Children should be involved in all aspects of our response to COVID-19, but this is especially clear in relation to their education. Children must be involved at all levels of decision making, including at Scottish Government and Local Authority level, as well as individual school level. In terms of the UNCRC, those views must be given ‘due weight in accordance with the age and maturity of the child’. These requirements do not mean that the best interests or the views of children in relation to school reopening should trump those of others – but they do require children’s best interests and views to be factored into decision-making.

At a national level, the Scottish Government must ensure that children’s views are part of all decision-making processes, including by involving them in the work of the ERG. We acknowledge that this is challenging in a pandemic, and with opportunities to engage in face to face discussions limited, but Ministers must find ways to ensure children’s voices are heard.

The ERG should make clear that local authorities and schools must also engage with children and young people in their area when planning the re-opening of schools and when making longer term plans to address the impact of school closures. Particular attention should be given to ensuring the participation of children who have been disproportionately affected by school closures, for example care experienced children (Article 20); disabled children (Article 23); those experiencing poverty (Article 26); and those with a history of non-attendance or exclusion.

¹⁰ https://www.parliament.scot/S5_Education/General%20Documents/20200608Professor_Aoife_Nolan.pdf

*The How Young People's Participation in Schools Supports Achievement and Attainment*¹¹ research showed pupils' participation was essential in creating a sense of belonging at school and bringing a rights-based dimension to educational experience.

Non-discrimination (Article 2 UNCRC)

The right to education applies to all children – meaning those who need extra support must receive it even during an emergency. Achieving this alongside part-time attendance of school and blended learning will need proper assessment and significant resources.

Some children will have lost a close family member, others will have been pushed into poverty, or found themselves in unsafe situations without access to the safeguards that normally exist. Particular challenges have been experienced by children with Additional Support Needs, for whom a lot of support which is normally provided by the school has not been available, despite the fact that local authority statutory duties towards these children remain in effect. Angela Morgan's recently published review¹² demonstrates clearly the challenges that existed pre-pandemic and which will only have increased since: "...the implementation of Additional Support for Learning legislation is over-dependent on committed individuals, is fragmented, inconsistent and is not ensuring that all children and young people who need additional support are being supported to flourish and fulfil their potential." We expect many more children will be considered to have Additional Support Needs as they return to school.

We note that during the lockdown the measures put in place to identify and support vulnerable children through hubs have not been well taken up and the impacts of that missing support may well take some time to emerge. We can also expect an increase in the number of children needing mental health supports and these must be urgently addressed if we are to avoid long-term impacts on children. Certain groups of children are more at risk of negative mental health impacts from lockdown (including children with disabilities and additional support needs, young children, children due to be making school transitions this year, children affected by domestic abuse, those affected by substance abuse, those who parents have mental ill-health).

Alongside planning for the re-opening of schools, decision makers must ensure that as part of the education recovery process measures to address the impact school closures have had, not only on attainment but also social, emotional and mental health impacts, are put in place.

¹¹ <https://education.gov.scot/improvement/practice-exemplars/how-young-peoples-participation-in-school-supports-achievement-and-attainment/>

¹² <https://www.gov.scot/groups/additional-support-for-learning-review/#:-:text=The%20review%20was%20led%20by,needs%20progress%20in%20their%20learning.>

In addition, while most children will be in a position to return to school, there will inevitably be some for whom this will not be possible due to the particular health risks or other challenges they face. If such children are to enjoy their right to education on an equal basis to children in school, then they must be provided with available, accessible, acceptable and adaptable education, in line with their needs and specific situation.

Best interests (Article 3 UNCRC)

All decisions must be made with children's best interests as a primary consideration (Article 3 UNCRC). The CRC provides useful guidance in its General Comment 14¹³, but in brief it requires that:

- It be treated as a substantive right creating a positive obligation on the State
- All legal provisions should be interpreted through the lens of what best serves the child's interests
- The impact on a child or children of any decision must be assessed

Decision making

There are already statutory mechanisms in place such as the Getting It Right For Every Child (GIRFEC) and Children's Services Planning processes which provide a solid underpinning for decision making, as well as networks at local level that can inform national discussions and resource allocation. The Additional Support for Learning (Scotland) Act 2004 creates duties on local authorities to carry out assessments and to provide statutory Co-ordinated Support Plans for those children who meet the legal threshold. Compliance with these duties has been poor for a long time, but the current situation provides an opportunity to return CSPs to the status the Parliament intended them to have, as a central means for identifying, planning and responding to children's rights and needs.

Since early May, our office has been working with the Observatory of Children's Human Rights Scotland, and a range of subject matter experts to produce a Children's Rights Impact Assessment covering the effects of the pandemic and the State's responses to it. That CRIA will be published when it is finalised in July. However, conducting impact assessments is a duty on the State and it is important that the Government undertakes its own assessment to support decision making and ensure that children's rights are being properly considered.

As noted in the introduction, we note that the UN Committee on the Rights of the Child has set out a framework for States to consider the impact of the pandemic on children and young people. We welcome the decision of the Scottish Government to use this framework in its own reporting and suggest that it be adopted by the ERG. We set it out below and have highlighted the relevant sections.

¹³ https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

UN Committee Recommendations	
1	Consider the health, social, educational, economic and recreational impacts of the pandemic on the rights of the child.
2	Explore alternative and creative solutions for children to enjoy their rights to rest, leisure, recreation and cultural and artistic activities.
3	Ensure that online learning does not exacerbate existing inequalities or replace student-teacher interaction.
4	Activate immediate measures to ensure that children are fed nutritious food.
5	Maintain the provision of basic services for children including healthcare, water, and sanitation and birth registration.
6	Define core child protection services as essential and ensure that they remain functioning and available, including home visits when necessary, and provide professional mental health services for children living in lockdown.
7	Protect children whose vulnerability is further increased by the exceptional circumstances caused by the pandemic.
8	Release children in all forms of detention, whenever possible, and provide children who cannot be released with the means to maintain regular contact with their families.
9	Prevent the arrest or detention of children for violating State guidance and directives relating to COVID-19.
10	Disseminate accurate information about COVID-19 and how to prevent infection in languages and formats that are child-friendly and accessible to all children.
11	Provide opportunities for children's views to be heard and taken into account in decision-making processes on the pandemic.

We welcome constructive engagement with decision makers on education including members of the Education Recovery Group, with a view to ensuring children's human rights are embedded into all structures and processes.

Children and Young People's Commissioner Scotland

23 June 2020