

Investigation by the Children and Young People’s Commissioner Scotland

This document provides notice that the Children and Young People’s Commissioner Scotland (“the Commissioner”) intends to exercise his powers under section 7 of the Commissioner for Children and Young People (Scotland) Act 2003 (“the 2003 Act”), as amended by Part 2 of the Children and Young People (Scotland) Act 2014, to conduct an investigation into the following subject:

Restraint and Seclusion in Schools

As such it fulfils the Commissioner’s duties under section 8 of the 2003 Act to bring the investigation to the notice of persons likely to be affected by it. In the Commissioner’s judgement, these persons are those set out in Appendix A.

Statement of legal compliance

I have determined that this investigation falls within the scope of my investigative powers under section 7 of the 2003 Act and in particular is permitted under section 7(3) of that Act.

A handwritten signature in black ink, appearing to read 'Adanson', is positioned above the title of the Commissioner.

Children and Young People’s Commissioner Scotland

March 2018



Terms of Reference

1. Definitions

In the absence of accepted international legal definitions, we have adopted definitions of the terms “restraint” and “seclusion” which are based on a number of sources including ENABLE Scotland, the Mental Welfare Commission, the UK Government’s Department of Health, guidance and regulations issued under the Children’s Act 1989, the Northern Ireland Human Rights Working Group on Restraint and Seclusion, and the Court of Appeal in England.

‘Restraint’ is therefore defined as “holding a child or young person to restrict their movement”. This would include such techniques as CALM or MAPA manoeuvres. It includes mechanical restraints (eg wheelchair straps) except those used during the course of normal activities or transportation (e.g seatbelts or wheelchair harnesses).

‘Seclusion’ is defined as “the confinement of a child, without their consent, by shutting them alone in a room or other area which they are prevented from leaving”. Seclusion is not the same as a ‘time out’ which is defined as a behavioural intervention used as part of a structured behaviour support plan which does not necessarily involve being physically removed to a separate room or area.

‘Schools’ is defined as non-residential Local Authority schools, whether specialist or mainstream.

2. Background

The Commissioner’s office has received a number of enquiries from parents of children with Additional Support Needs and/or disabilities. We are aware of concerns that have been expressed about the treatment of those children in school and in particular about the use of restraint (whether direct physical restraint of a child by an adult/adults or the inappropriate use of disability support equipment to restrain a child) and seclusion techniques (including children excluded from the classroom or otherwise physically isolated) as a response to behaviour management, without it seems considering adequately what may lie behind that behaviour or the individual child’s needs.

A petition (PE01548) was lodged in February 2015 at the Scottish Parliament, calling for the Scottish Government to issue national guidance to resolve these concerns. The Commissioner’s office provided a submission to the Public Petitions Committee in support of that petition. In response, the Scottish Government reviewed its guidance on school exclusion: “Included, Engaged and Involved Part Two”, to include content on restraint and seclusion. It was published in June 2017 and states that:

“Any incident where a decision is made to physically intervene must be recorded and monitored. Details on how this should be undertaken should be included in an education authority’s policy on de-escalation, physical intervention.”

It goes on to state that:

“The rights of all children and young people must be a key consideration where physical intervention is being considered.”

The Commissioner’s office retains a number of outstanding concerns about the guidance. In particular, the fact that it is focused on behaviour management and exclusions risks giving the impression that the problem is the child’s behaviour rather than an unmet or unrecognised need.

However, one benefit to the existence of guidance is that, notwithstanding its non-statutory nature, there has now been a clear expectation set by the Scottish Government that:

- Every education authority should have a policy on physical intervention
- That policy should include a mechanism/process for decisions on physical intervention to made and recorded
- All decisions to physically intervene should be recorded in line with the relevant policy
- In every case, the record should demonstrate how children’s rights have been taken into account in reaching the decision to physically intervene

3. Rights issues

All children have the right to protection from abuse. Relevant articles of the UN Convention on the Rights of the Child (**UNCRC**) include:

- Article 2, which says all children have the rights the Convention lays out, and that no child should be discriminated against
- Article 3, which says the best interests of a child should be considered in considering any action that would have an impact on them
- Article 12, which says that children have the right to express a view and have it taken into consideration when decisions are made about them
- Article 19, which says children should be protected from all forms of violence and injury
- Article 23, which says children with disabilities should enjoy full lives in conditions that uphold their dignity
- Article 24, which says that the child should enjoy the highest attainable standard of health
- Article 28, which says that schools should discipline children in a manner consistent with their dignity
- Article 29, which says a child’s education should allow them to develop their personality, talents and mental and physical abilities to their fullest potential.
- Article 37, which says that children have a right to be protected from cruel, inhuman or degrading treatment or punishment, and a right not to be deprived of their liberty unlawfully or arbitrarily

Children and young people also have rights under a number of other international instruments.

The European Convention on Human Rights (**ECHR**)

- [Article 3](#) - prohibits torture, inhuman or degrading treatment or punishment
- [Article 5](#) – the right to liberty and security
- [Article 8](#) – the right to respect for private life, which includes respect for physical integrity

The International Covenant on Civil and Political Rights (**ICCPR**)

- [Article 7](#) – prohibits torture or cruel, inhuman or degrading treatment or punishment

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**)

- [Article 16](#) - prohibits torture or cruel inhuman or degrading treatment or punishment

The UN Convention on the Rights of People with Disabilities (**UNCRPD**)

- [Article 5](#) – the right to equality and non-discrimination
- [Article 7](#) – the right of disabled children to enjoy all of their rights and freedoms
- [Article 14](#) – prohibits unlawful or arbitrary deprivation of liberty
- [Article 15](#) - prohibits torture or cruel, inhuman or degrading treatment or punishment
- [Article 17](#) – the protection of physical and mental integrity
- [Article 24](#) – the right to education

In its 2016 Concluding Observations on the fifth periodic report of the UK, the UN Committee on the Rights of the Child expressed its concern about:

“The use of restraint and seclusion on children with psycho-social disabilities, including children with autism, in schools.”

The Committee urged the UK to abolish restraint for disciplinary purposes and ensure that it is used against children exclusively to prevent harm to the child or others and only as a last resort. It urged the abolition of “isolation rooms” and also recommended that the state should:

“Systematically and regularly collect and publish disaggregated data on the use of restraint and other restrictive interventions on children in order to monitor the appropriateness of discipline and behaviour management for children in all settings, including in education, custody, mental health, welfare and immigration settings.”

Furthermore, in its Concluding Observations (published in August 2017), the UN Committee on the Rights of People with Disabilities urged the UK to:

“Adopt appropriate measures to eradicate the use of restraint for reasons related to disability within all settings”, and

“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”

Restraint and seclusion therefore are clearly issues that engage children and young people's human rights and are of significant concern to the bodies charged with monitoring the UK's compliance with its international obligations. Recording of incidents of restraint and seclusion is recognised internationally as a critical means of ensuring that practice is rights-compliant and appropriately monitored and scrutinised.

4. Remit

Under the terms of the Children and Young People's Commissioner (Scotland) Act 2003, as modified by the Children and Young People (Scotland) Act 2014, the Commissioner has the power to investigate:

"whether, by what means and to what extent, a service provider has regard to the rights, interests and views of children and young people in making decisions or taking actions that affect those children and young people."

Local Authorities, and indeed schools, are clearly service providers under the terms of the legislation and physical intervention involves both a decision and an action, as does the recording (or not) of that intervention. Development and implementation of a policy on physical intervention and recording is also an action, informed by a number of decisions. See Section 2 on 'Rights' for the extent to which children's rights are engaged. Children's views and interests are significant in the extent to which they should be part of how policies and procedures are developed and implemented.

The Commissioner's powers of investigation are not without limit and in particular cannot be exercised where to do so would duplicate work that is properly the responsibility of another body. In this case, we have identified The Equality and Human Rights Commission (EHRC), Education Scotland, the Care Inspectorate and the Scottish Public Services Ombudsman (SPSO) as potentially having an interest in terms of their statutory functions.

Currently Education Scotland has responsibility for inspecting and reporting on the quality of education across all types of provision, but does not have a specific role to ensure appropriate care and dignified treatment. This lies within the remit of the Care Inspectorate, but only in the setting of registered care providers (as defined in S.47 and Schedule 12 of the Public Services Reform (Scotland) Act 2010). This would exclude schools which are not registered care providers (e.g. a non-residential local authority special school or mainstream school).

The SPSO investigates complaints about maladministration or service failure. However, the Ombudsman is barred by legislation (S.10 of Schedule 4, Scottish Public Services Ombudsman Act 2002) from looking into; *"conduct, curriculum or discipline in any educational establishment under the management of an education authority"*, and in any case can only respond to individual complaints; they cannot conduct a general investigation.

The EHRC has the power to conduct an investigation (S.20 of the Equality Act 2006) where the Commission suspects unlawful conduct on the part of a (natural or legal) person. 'Unlawful' means in breach of the provisions of the Equality Act 2010 – i.e. unlawful discrimination and harassment etc. While inappropriate physical intervention experienced by a disabled child could potentially be considered discrimination or harassment under the 2010 Act, it would be challenging to frame a failure to record that intervention adequately as an unlawful act, as opposed to simply poor practice.

Physical intervention of a child without a disability would fall outwith the EHRC's powers in any case (age is not considered a protected characteristic in school). The EHRC also has the power to conduct an inquiry on human rights issues (s.7 of the 2006 Act), but the Commissioner's powers have a particular focus on the "rights views and interests" of children and young people, allowing an investigation of broader scope than that encompassed by the EHRC's inquiry powers.

Given the significant rights issues raised, and the apparent lack of any other body which can legitimately address this specific matter in this way, it is the Commissioner's view that it falls within the scope of his legal powers.

5. Purpose/aims

As the Scottish Government is not currently undertaking the monitoring role called for by the UN Committee on the Rights of the Child, there is no way of knowing whether policies are in place; whether or not they appropriately reflect children's rights; and whether they provide clearly that physical intervention should be a last resort as required by international human rights bodies. An investigation would shed light on this area and we consider that there has been adequate time since the guidance was issued for Local Authorities to have ensured that policies and procedures are in place.

The Commissioner therefore intends to conduct an investigation to establish whether Authorities are fulfilling their duties to ensure that the appropriate policies are in place; and to record and monitor instances of physical intervention in schools. In particular, the investigation will address the following questions:

Development of policy

- Does the Authority have a policy on recording of physical intervention (restraint and seclusion)?
- When was the policy last updated?
- How were children and young people's rights, views and interests taken into account when developing the policy?

Content of policy

- Who is authorised to undertake physical interventions?
- How are decisions to intervene taken and recorded and by whom?
- How are children and young people's rights, views and interests considered, balanced and recorded when a decision to physically intervene is taken?
- Does the policy clearly state that physical intervention is a last resort and should only be used to prevent harm to the child or to another person?
- Does the policy require recording of: the kind of intervention used; the length of time any intervention lasted; and whether any injury was caused as a result of the intervention?
- How and at what stage are the child and parents informed of the reason for the intervention?
- Does the policy require a post-incident review to take place and be recorded?
- Are the child and parent offered an opportunity to participate in the post-incident review?

Data

- How are incidents of physical intervention recorded (eg electronically or manually)?
- How many incidents of physical intervention have taken place in the authority's schools? How many of restraint, how many of seclusion?
- In relation to how many individual children or young people?
- How many interventions related to a child or young person with Additional Support Needs and/or with a disability?
- How many interventions resulted in a physical injury to the child or young person?

Audit, monitoring and scrutiny

- How are incidents of physical intervention audited and monitored at local authority level and by whom?
- As part of this monitoring, what is the process for any concerns about compliance with the policy to be identified and addressed?
- How are children and young people's rights, views and interests taken into account in the monitoring and review of the policy and its implementation?

Training

- Does the authority keep records of staff training in physical intervention techniques?
- How often is it provided and/or updated?

6. Method/timeframe

The investigation will begin with a request to all local authorities for their policies on physical intervention, and (where separate) for policies on recording of incidents of physical intervention. We will also request copies of recording forms where these are available at local authority level. These requests will be made invoking the Commissioner's investigatory powers. A deadline of ten working days will be set for a response. Analysis of this material will be conducted by staff within the office.

At the same time, additional questions will be asked of each Local Authority Chief Executive (see Section 4 for the issues these questions will explore) using an online survey form to gather the evidence. The survey will be used to make it easier for authorities to respond, and to allow for easier analysis of those responses. It will also be issued under the Commissioner's investigatory powers. A longer deadline (20 working days) will be set for responses to these questions.

Children and young people will assist the office with developing and agreeing the recommendations that will come out of the investigation.

7. Information governance

It is not anticipated that personal information will be collected in the process of this investigation. However, in the event that any personal information is collected, it will be processed in line with the eight principles of the [Data Protection Act 1998](#). You can find out more about how CYPCS look after personal data in our [Data Protection Policy](#).

8. Output

Findings will be reported to the Scottish Parliament as well as to those identified as interested parties.

Appendix A – List of interested parties

Interested parties are defined as those who are required to directly respond to the investigation or who may be the subject of recommendations.

Aberdeen City Council

Aberdeenshire Council

Angus Council

Argyll and Bute Council

Edinburgh City Council

Clackmannanshire Council

Dumfries and Galloway Council

Dundee City Council

East Ayrshire Council

East Dunbartonshire Council

East Lothian Council

East Renfrewshire Council

Falkirk Council

Fife Council

Glasgow City Council

Highland Council

Inverclyde Council

Midlothian Council

Moray Council

Comhairle nan Eilean Siar (Western Isles Council)

North Ayrshire Council

North Lanarkshire Council

Orkney Islands Council
Perth & Kinross Council
Renfrewshire Council
Scottish Borders Council
Shetland Islands Council
South Ayrshire Council
South Lanarkshire Council
Stirling Council
West Dunbartonshire Council
West Lothian Council
COSLA
The Scottish Government's Learning Directorate
Education Scotland
The Scottish Parliament's Education and Skills Committee
General Teaching Council for Scotland