

## CYPCS BRIEFING 2: Independent Advisory Group

### ***The impact of emergency police powers on the human rights of children and young people in Scotland during the Covid-19 pandemic***

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.

### Introduction

This second briefing has been prepared by the office of the Children and Young People's Commissioner Scotland (CYPCS), as an update, to support the scrutiny and monitoring of the Independent Advisory Group (IAG) and is informed by our work and engagement with stakeholders, partners, civil society, families, and importantly, children and young people since the outset of the global health pandemic in 2020.

In our first briefing we outlined both the international and domestic human rights, legal and policy frameworks, which underpin Scotland's care and justice systems for children, young people, and families. We continue to *'pay particular attention to any use of powers involving children, young people or persons within disadvantaged communities ... to ensure that they are fully reflective of Police Scotland's duties,'* and values to uphold international human rights principles, with the overall aim of safeguarding public health.

Over the last 15 months, the lack of clarity and certainty around the status of law, policy and guidance, coupled with little opportunity for scrutiny, contributed to a growing corpus of evidence<sup>1</sup> highlighting the impact of the pandemic on children and young people's everyday lives: Covid-19 restrictions have exacerbated existing inequalities.

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<sup>1</sup> and particularly the extensive and valuable contributions, research, and reports from internal and external contributors to the IAG, which we have used to support the work of our office.

With the benefit of this evidence, as well as hindsight, we have highlighted 5 areas of policy or law which may be of relevance to the scope and remit of the IAG's scrutiny and focused on children and young people who are:

- (i) already in conflict with the law or deprived of their liberty.
- (ii) living in poverty.
- (iii) are care experienced, vulnerable or at risk of abuse or exploitation.
- (iv) have mental health needs or other disabilities; or
- (v) exercising their rights of association and peaceful assembly.

We remain concerned that the most profound effects of the pandemic have been felt by some of our society's most vulnerable children and young people. There is no doubt that the long-term impacts will be significant for many years to come.

*'For children caught at the apex of this crisis, there is a genuine prospect that its effects will permanently alter their lives.'*

*Children facing acute deprivation in nutrition, protection or stimulation, or periods of prolonged exposure to toxic stress, during the critical window of childhood development are likely to develop lifelong challenges as their neurological development is impaired.<sup>2</sup>*

## Background

This 'critical window' of 'childhood' has been afforded a special status in international human rights law. Whilst the human rights of children are protected in numerous international treaties<sup>3</sup> the UNCRC, is the only international treaty to focus exclusively on protecting and promoting children's interests.<sup>4</sup>

The rights contained in the UNCRC are universal, indivisible, and interdependent, and, in the context of the remit of the IAG, the UNCRC Articles most directly relevant to policing and child justice are:

<sup>2</sup> [United Nations Policy Brief: The Impact of COVID-19 on children](#)

<sup>3</sup> Including, for example, in the: International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); Convention on the Elimination of All Forms of Discrimination Against Women (1979); and Convention on the Rights of Persons with Disabilities (2007).

<sup>4</sup> Goldson, B. & Muncie, J. (2012). 'Towards a global 'child friendly' juvenile justice?', International Journal of Law, Crime and Justice 40: 47-64.

Firstly, the four general principles of the UNCRC, which underpin how the Convention should be interpreted, and put into practice, namely:

- Article 2: Non-Discrimination<sup>5</sup>
- Article 3: the 'best interests' of a child must be a primary consideration<sup>6</sup>;
- Article 6: the right to life, survival and development<sup>7</sup>;
- Article 12: the right to have views taken into account in all decision-making.

and,

- Article 1: the UNCRC applies to all children under 18<sup>8</sup>;
- Article 15: freedom of association and peaceful assembly<sup>9</sup>;
- Article 16: the child has the right to privacy and family life<sup>10</sup>
- Article 19: the child has the right to protection from abuse.
- Article 24: the child has the highest attainable standards of health.
- Article 27: the child has the right to an adequate standard of living.
- Article 37(b): no child shall be unlawfully or arbitrarily deprived of liberty<sup>11</sup>;
- Article 37(c): if deprived of liberty to be treated with humanity and dignity.
- Article 39 the child has the right to assistance to recover from abuse/trauma.
- Article 40(1): a child must be treated in a manner consistent with their dignity and worth, which considers their age and promotes reintegration into society.
- Article 40(2): a child has the right to a fair trial.<sup>12</sup>
- Article 40(3): the state must promote and establish laws, procedures, and institutions specifically applicable to children in conflict with the law; and
- Article 40(4): the state must provide a variety of dispositions, such as care, guidance, counselling, education, and vocational training programmes... to ensure that children are dealt with in a manner appropriate to their wellbeing.

<sup>5</sup> mirrors Article 14 of the European Convention on Human Rights

<sup>6</sup> In many areas of Scots law, the 'best interests' of a child is the paramount, as opposed to 'primary' consideration.

<sup>7</sup> mirrors Article 2 of the European Convention on Human Rights

<sup>8</sup> As outlined in CYPCS Briefing (1) the varying Scots law definitions of a 'child' 'young person' and 'adult' continue to cause concern for the human rights protection of children aged 16 or 17.

<sup>9</sup> mirrors Article 11 of the European Convention on Human Rights.

<sup>10</sup> mirrors Article 8 of the European Convention on Human Rights.

<sup>11</sup> mirrors Article 5 of the European Convention on Human Rights.

<sup>12</sup> and mirrors Article 6 of the European Convention on Human Rights.

In interpreting the UNCRC, the UN Committee on the Rights of the Child gives guidance in its recent *General Comment on children's rights in the child justice system*,<sup>13</sup> reminding States of the international standards and principles of 'child-friendly justice'<sup>14</sup>:

*"States parties should enact legislation and ensure practices that safeguard children's rights **from the moment of contact** with the system, including at the **stopping, warning or arrest** stage, while in **custody of police** or other law enforcement agencies, during **transfers** to and from police stations, places of detention and courts, and during **questioning, searches** and the taking of evidentiary **samples**."*

In accordance with these human rights obligations, the expectation must be that police officers engaging with a child or young person, whether as a suspect, accused person, victim or witness, must take account of the international human rights principles, in line with their statutory duties and national policy and guidelines.

Over the past year, we welcomed efforts by the Scottish Government and Police Scotland to embed a rights-based approach for all children and young people through commitment to the Promise of the Independent Care Review<sup>15</sup>, wholesale reviews of the youth justice<sup>16</sup>, care, protection<sup>17</sup>, and education<sup>18</sup> systems, and, of course, incorporation of the UNCRC into Scots law.

In October 2020, we published a report on whether Scots law complies with the UNCRC in its consideration of children aged 16 and 17 in conflict with the law: a legal analysis undertaken by Kate Whiting, a University of Edinburgh LLM student<sup>19</sup>. It concludes that Scots law does not comply with the UNCRC, as our systems often fail to afford children the special safeguards and access to child-friendly justice in accordance with their rights under international human rights law.

<sup>13</sup> UN Committee on the Rights of the Child, 'General comment No.24 (2019) on children's rights in the child justice system'.

<sup>14</sup> Echoing the Council of Europe's Guidelines on child-friendly justice.

<sup>15</sup> [www.thepromise.scot](http://www.thepromise.scot).

<sup>16</sup> [A Rights-Respecting Approach to Justice for Children and Young People: Scotland's Vision and Priorities Scottish Government June 2021](#)

<sup>17</sup> The introduction of a Scottish [Barnahus \(House for healing\)](#) to support taking of children's evidence in the justice system is a welcome model of a human rights based approach and child-friendly justice. The [Child Protection National Guidance](#) has been revised and will be published at the end of July 2021

<sup>18</sup> [Support for Learning: All our Children and All their Potential Angela Morgan Independent Review 2020](#)

<sup>19</sup> [Older Children in Conflict With the Law: A legal analysis of Scots law compliance with the United Nations Convention on the Rights of the Child, for children aged 16 and 17 years](#) - 'Whiting K. CYPSC 2020

This conclusion aligns with the findings and recommendations of the *Independent Children's Rights Impact Assessment on the Response to Covid-19 in Scotland*<sup>20</sup> (CRIA), which we published last July, alongside a child-friendly version of the findings. This is the biggest children's rights impact assessment on COVID-19, conducted anywhere in the world and it assembles evidence and expert analysis from the Observatory of Children's Human Rights Scotland. Of relevance to the work of the IAG, Appendix 9<sup>21</sup> provides assessment and recommendations on the human rights impacts on children in conflict with the law and children in secure care, largely informed by the views and reflections of young people and people working with them in the care and justice systems on their experiences of policing during the pandemic.<sup>22</sup>

The CRIA found that COVID-19 has starkly highlighted areas of existing Scots law that are not compliant with the UNCRC. For example, inconsistencies in the definition of 'a child' across existing Scots law resulted in emergency legislation which is incompatible with the UNCRC. As we outlined in our first paper, disappointingly, emergency Coronavirus legislation was put in place (some of which is still in force) that defines Scottish 16- and 17-year-olds as 'adults', contrary to the internationally recognised definition of 'a child' as, 'any person under the age of 18'.

There are ongoing concerns that this may have resulted in children being criminalised, prosecuted or detained for breaching COVID-19 regulations without necessarily benefitting from special safeguards with regard to mental health, care, protection, and safeguarding in the justice system.

*"If we could get our response to 16- and 17-year-olds right and make sure we recognised and truly treated all of these children as children, then we would go a long way towards really getting it right for every child."*<sup>23</sup>

It is critical that all existing Scots law and policy is reviewed and assessed to ensure compatibility with international human rights law, and specifically the UNCRC. Some of the consequential amendments in the criminal justice system were identified in Kate Whiting's analysis, and we welcome Scottish Government's plans to undertake this wider compatibility assessment across all areas of Scots law and policy in

<sup>20</sup> <https://cypcs.org.uk/news-and-stories/rights-of-children-overlooked-during-coronavirus-emergency/>

<sup>21</sup> Appendix 9 Compiled by Claire Lightowler and Debbie Nolan from the Children and Young People's Centre for Justice (CYCJ) <https://cypcs.org.uk/wp-content/uploads/2020/07/CRIA-appendix-conflict-law.pdf>

<sup>22</sup> 'Spend Time With Me' Children and young people's experiences of COVID-19 and the justice system Nolan D., CYCJ 2020

<sup>23</sup> CYCJ quoted: 'Older Children in Conflict With the Law: A legal analysis of Scots law compliance with the United Nations Convention on the Rights of the Child, for children aged 16 and 17 years' Whiting K. CYPSC 2020

preparing for implementation of the UNCRC (Incorporation)(Scotland) Act (when in force).

In our first Briefing, we called upon Police Scotland to take the following action:

- **Police Scotland should undertake a review of FPNs issued to 16/17 year olds prior to the amendment of the Scottish Regulations to ensure that the penalties will be removed from the children's records and the interim Vulnerable Persons Database.**
- **Police Scotland should confirm how many children and young people were referred to SCRA, Crown Office and Procurator Fiscal Service or subject to diversionary measures under the Youth Justice Strategy as a result of their conduct or behaviour during the emergency period.**

Unfortunately, Police Scotland were unable to provide this information and data, due to methods of recording and retrieval across different Police databases. In order to assess the impact of the use of the emergency Coronavirus powers, and not merely enforcement through issuing Fixed Penalty Notices (FPN), including assessment of any unintended consequences on children and young people's rights, our office will continue to engage with Police Scotland and the Scottish Government on this issue.

### Deprivation of Liberty during the pandemic

As the impact of the pandemic became clear, international experts,<sup>24</sup> including the UN High Commissioner for Human Rights, Michelle Bachelet, recognised that the pandemic's effect on children in places of detention (including police custody) was a serious concern and a risk to their rights to life, liberty and health. Factors including increased risk of infection within facilities where people were detained, limitations on rights to family life and contact, and reduced opportunities to access professional supports such as mental health supports, all combined to exacerbate the impact of the deprivation of liberty.

However, these concerns were not reflected in the steps taken by the Scottish Government to ensure the emergency measures complied with children and young people's human rights.

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<sup>24</sup> This included the UN Committee on the Rights of the Child (UNCRC), the Office of the UN High Commissioner for Human Rights (OHCHR), the World Health Organisation (WHO), the UN Office on Drugs and Crime (UNODC), the UN Joint Programme on HIV/AIDS (UNAIDS), and the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

For example, children and every detainee (of any age) detained on 'remand'<sup>25</sup> were excluded from the eligibility criteria under the *Release of Prisoners (Coronavirus) (Scotland) Regulations 2020*.<sup>26</sup>

CYPCS called on the Scottish Government to follow the UN Committees' recommendations and uphold international human rights standards, remove all children from custody, find alternative places of safety as necessary, and amend the provisions. Despite the concerns raised in the Scottish Parliament by the Scottish Human Rights Commission, the UK's National Preventative Mechanism (NPM) along with civil society organisations and our office,<sup>27</sup> no child, nor remand prisoner was released early in Scotland.

We reiterated our concerns on World Children's Day (20 November 2020), in a blog with Claire Lightowler (Director of the Children and Young People's Centre for Justice)<sup>28</sup> and in an article for the Scottish Journal of Residential Childcare.<sup>29</sup> We considered the human rights experiences of children detained on remand and reflected on why such a high proportion of children who have not been tried or sentenced, are being detained at all, let alone during a pandemic, in adult penal facilities.

We have continued to seek accountability and assurances from the Scottish Government regarding the urgent removal of children deprived of their liberty in YOIs and the legislative and policy amendments necessary for the cessation of detention of children under 18 in police custody, adult court cells, as well as in secure hospitals, immigration accommodation and any unregulated, residential placements.<sup>30</sup> We have engaged with Police Scotland and other public bodies to ensure that adequate human rights protections are in place for all vulnerable children who are subject to interventions and restrictions on their freedoms in institutions during the pandemic.<sup>31</sup>

<sup>25</sup> Untried or awaiting sentence or deportation.

<sup>26</sup> [The Release of Prisoners \(Coronavirus\) \(Scotland\) Regulations 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

<sup>27</sup> Letter 25 May 2020 from Bruce Adamson to Margaret Mitchell MSP, [https://archive2021.parliament.scot/S5\\_JusticeCommittee/Inquiries/20200525\\_CYPctoMM.pdf](https://archive2021.parliament.scot/S5_JusticeCommittee/Inquiries/20200525_CYPctoMM.pdf)

<sup>28</sup> <https://www.cycj.org.uk/not-cut-out-for-prison-depriving-children-of-their-childhood/>

<sup>29</sup> "Not cut out for prison": *Depriving children of their childhood*, Lightowler, Adamson Galli SJRCC 2021 [https://www.celcis.org/files/5916/1468/5804/2021\\_Vol\\_20\\_No\\_1\\_Lightowler\\_C\\_Not\\_cut\\_out\\_for\\_prison\\_Depriving\\_children\\_of\\_their\\_childhood.pdf](https://www.celcis.org/files/5916/1468/5804/2021_Vol_20_No_1_Lightowler_C_Not_cut_out_for_prison_Depriving_children_of_their_childhood.pdf)

<sup>30</sup> The Commissioner has intervened in the public interest in both the UK Supreme Court and the Court of Session in Scotland, on some of these matters over the last year where children from England have been deprived of their liberty, outwith the Scottish statutory scheme, in non-secure, unregulated accommodation.

<sup>31</sup> Including the Care Inspectorate, the National Preventative Mechanism, the Promise team, the Ministry of Justice, HM Inspector of Prisons in Scotland, the Youth Justice Improvement Board, COSLA

## ***Police Custody***

In our first Briefing we sought assurances from Police Scotland around the practices of stopping, searching, charging, arresting, restraining and detaining any child in custody, during the pandemic.

We also called for greater scrutiny and monitoring of conditions of detention to prevent breaches of children's human rights. For example, for the practices of strip searching, restraint and the use of 'spit-hoods' in police custody to be prohibited. In this time of a life-threatening health pandemic, the violation of children's rights to be protected from cruel, inhuman and degrading treatment, and to privacy and bodily integrity, may also put police officers and children at serious risk to their lives, health and wellbeing. We had been reassured by Police Scotland that children were only ever detained in police custody and restrictive practices used very rarely, as protective measures of last resort.

However, we were disappointed when, in March 2021 we made aware of the number of children who had been detained in police custody during the pandemic.<sup>32</sup> It was reported that over the 3 years, (including during the pandemic) children as young as 11 years old had been detained in police custody rather than in a place of safety<sup>33</sup>. The vast majority of the approximately 6,000 children were 16 or 17 years old, with over 1,500 children being detained for longer than 24-hour periods. We are gravely concerned that these practices fail to comply not only with international human rights requirements as outlined above, but with Police Scotland's own commitment to a human rights-based approach in policing. Many of these children were deprived of their liberty for minor offences.<sup>34</sup> Importantly, 3 of the children were detained having 'failed to comply with coronavirus regulations'.

Police Scotland recently produced a report providing an update on progression against the recommendations made by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) following its visit to the United Kingdom in 2018, and a custody update regarding children.<sup>35</sup> We welcome the approach being taken to ensure increased availability of alternatives to custody and places of safety to ensure children's human rights are fulfilled. However, there is still insufficient data to assess whether children's rights are being upheld when detained in police custody.

<sup>32</sup> As reported in Scotland on Sunday article M. McLaughlin, 28/03/21 <https://www.scotsman.com/news/politics/revealed-children-as-young-as-11-among-nearly-6000-youngsters-held-overnight-in-police-cells-3180336>

<sup>33</sup> In accordance with s22 Criminal Justice (Scotland) Act 2016

<sup>34</sup> Minor offences, such as possession of false identification documents, being drunk and incapable, or being found with alcohol in a sports ground: with 125 children detained overnight after being arrested in connection with shoplifting offences.

<sup>35</sup> Police Scotland Children in Custody update Report 08 June 2021: <https://www.spa.police.uk/spa-media/cw2d1tey/rep-20210607-item-4-police-scotland-custody-update-cover-paper-docxnew.pdf>

We call again on Police Scotland to **ensure that data is provided to the CYPCS and, insofar as relevant to its Terms of Reference, the IAG, confirming the number of children under 18 and young people under 21 who were detained, for any reason, and who were searched or restrained during the period from 27 March 2020 to date.**

## Vulnerable children and young people

*“You get like vilified...you’re not a child anymore, you’ve committed this offence now you’re a monster instead.” (Young Person)<sup>36</sup>*

There are continuing risks that children who display distressed behaviour, whether as a result of mental health concerns, poverty, disability, or as a response to neglect or abuse, are criminalised because of distressed or challenging behaviour.

Officers must be mindful of needs that may not always be immediately apparent. Some groups of children experienced disproportionate levels of police contact prior to the pandemic, including care experienced children and children from Black, Asian and minority ethnic backgrounds. For example, children living in residential care reported their carers frequently calling for police assistance in circumstances where families would only do so as a last resort. Police Scotland have taken a proactive approach following a pilot in Dumfries and Galloway and significantly reduced the number of children in care being criminalised as a result of distressed behaviour.

Throughout the pandemic, we have continued to receive concerns that police action may inadvertently criminalise certain groups of young people, who are less able or less likely to observe Scottish Government guidance, such as young people who live in unsafe housing, or are exposed to abuse or violence at home, or whose placements break down, and who may be more likely to be in public spaces more often.

Concerns were also raised about the impact on children’s rights in the administration of justice with a significant backlog of cases in courts and tribunals, which were already overstretched and have been unable to work at normal capacity, exacerbated by an increase in legal cases resulting from the lockdown periods. in the medium and long-term.

Similarly, in the Children’s Hearings System, there have been significant concerns raised by families and representatives, about the impact on children’s rights to

<sup>36</sup> Young person quoted in Whiting K, see fn19

participate, be included and to have their views and best interests taken into account in judicial decision-making without adequate supports, including access to technology and advocacy services.

## Poverty

In their landmark research on children in conflict with the law, McAra and McVie's findings suggest that, whilst probably unintentionally, the police unfairly target certain categories of children and appear to make distinctions about the 'respectable' and the 'unrespectable', and thus those who can be accorded leniency and those who cannot.<sup>37</sup>

The research evidence has continued to show that children in conflict with the law are some of the most vulnerable members of any society, with high levels of trauma, adversity and victimisation. The Edinburgh Study found that early victimisation, rather than early involvement in violence, was one of the most significant predictors of later involvement in violence, leading McAra and McVie to argue that there is a need to treat children involved in violence first and foremost as vulnerable children rather than as offenders.<sup>38</sup> Their work highlights how the system continues to create and maintain a focus on a small group of 'usual suspects' who are drawn from the most vulnerable and challenging backgrounds and highlighting that attention on this group has become increasingly concentrated as we see reduced numbers of entrants into the youth justice system.<sup>39</sup>

This is a continuing concern as highlighted by Claire Lightowler and noted in the Independent CRIA where children and young people who are treated as 'the usual suspects' have described their experience of police contact during lockdown as:

*'Nasty... they approach me most times I am out.'*  
*'I've made an effort to stay in and keep my head down and the police have still been at my door blaming me for things.'* (Young Person)<sup>40</sup>

Claire Lightowler found that poverty has a significant and direct effect on children who come into conflict with the law: "Scotland's approach to children in conflict with the law should grapple with responding to poverty and redressing economic

<sup>37</sup> (McAra and McVie, 2005). P42

<sup>38</sup> McAra, L., and McVie, S. (2010) 'Youth crime and justice: key messages from the Edinburgh Study of Youth Transitions and Crime', *Criminology and Criminal Justice*, 10(2): 211–230.

<sup>39</sup> McAra, L., and McVie, S. (2005) 'The usual suspects? street-life, young people and the police', *Criminology and Criminal Justice*, 5(1): 5–36.

<sup>40</sup> Children quoted in Independent CRIA evidence 'Spend Time with Me' Nolan D 2020

inequalities; as well as paying attention to how agencies, professionals and organisations respond to poorer children, families and communities.

It is particularly concerning that children who experience poverty are more likely than more affluent children to be charged by the police for identical behaviours.

This raises questions about discrimination, fairness and the ability of certain children to exercise their rights.<sup>41</sup>

From Police Scotland data on the use of fixed penalty notices under the Covid-19 regulations in Scotland, Professor Susan McVie noted that 'there was a significant difference in the likelihood of receiving a Covid-related FPN based on the level of deprivation for the recipient's home address with more than half (51.8%) of all FPNs being offered to people living within Scotland's 20% most deprived communities.'<sup>42</sup>

Professor McVie has advised the IAG that the evidence suggests that this gap reduced as the pandemic went on, which, in her view reflects a 'perverse equity' caused by an increase in police encounters amongst those at the 'affluent' end of the poverty spectrum, rather than a reduction amongst those at the 'deprived' end. The reduction in prior criminal histories amongst people who received FPNs suggests that the pandemic created a large number of first-time offenders, many, or most of whom, are younger people.

### ***Mental Health***

*'I have seen the police around but have not directly spoken to them but the thought of them approaching me asking why I'm out gives me so much anxiety and makes me not want to go anywhere.'* (Young Person 2020)<sup>43</sup>

Almost two fifths (39%) of the young people who responded to the Scottish Youth Parliament, YouthLink Scotland and Young Scot's survey, were concerned for their mental wellbeing, and 46% stated that they felt moderately or extremely concerned about the mental wellbeing of others,<sup>44</sup> and there has been an increase in the number of young people admitted to hospital because of mental health issues and overdoses.<sup>45</sup>

<sup>41</sup> Lightowler, C. (2020) Rights Respecting? Scotland's Approach to Children in Conflict with the Law. Glasgow: Centre for Youth and Criminal Justice (CYCJ), University of Strathclyde.

<sup>42</sup> See section 6.1 of McVie, S. (2021) Second Data Report on Police Use of Fixed Penalty Notices under the Coronavirus Regulations in Scotland.

<sup>43</sup> Children quoted in Independent CRIA evidence 'Spend Time with Me' Nolan D 2020

<sup>44</sup> Para 381 Report on the impact of the COVID-19 pandemic on equalities and human rights Scottish Parliament Equalities and Human Rights Committee March 2021

<sup>45</sup> Para382 'Report on the impact of the COVID-19 pandemic on equalities and human rights' Scottish Parliament Equalities and Human Rights Committee. 02 March 2021 <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EHRiC/2021/3/2/1283533c-8aed-4a8c-8034-1ab216baca73-1/EHRiCSO52021R5.pdf>

Some young people have been particularly vulnerable and at risk of deterioration in their mental health. LGBT Youth Scotland<sup>46</sup> highlighted that LGBT young people are more likely to experience mental health problems, compared to their non-LGBT counterparts, and face barriers in accessing mental health services. In their survey of LGBT young people, 91% responded that they have concerns about their mental health and wellbeing.<sup>47</sup>

Similarly, young carers have reported taking on greater roles and responsibilities compared to their usual stressful and busy schedule. Lockdown presents challenges for respite services usually available and 90% of Carers Trust Scotland members have had concerns around their own mental health and wellbeing.<sup>48</sup>

With the closures of schools and places for play and leisure, young carers have been under increased pressure and anxiety without any supports being available. Public authorities are under a duty to provide additional supports to these young people and we note that, after the re-opening of schools, many of these services and supports were reinstated.

### *Children at risk of harm*

The Scottish Children's Services Coalition (SCSC) emphasised that some children and young people rely upon the care and protection provided by schools and other agencies.<sup>49</sup> During school closures or mandated isolation periods, children were unable to access supports and services from trusted adults and partners in Children's Services, through the policy frameworks of GIRFEC and the Whole Systems Approach.

The Scotland in Lockdown study, published in December 2020, found that for domestic abuse sufferers who were still living with their abusers during lockdown (all of whom were living with school aged children) abuse had intensified and 'safety was a critical issue for this population,'<sup>50</sup> where children were at risk of increased harm from exposure to domestic abuse.

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<sup>46</sup> LGBT Youth Scotland is a Scottish youth organisation dedicated to the inclusion of lesbian, gay, bisexual and transgender (LGBT) young people aged from 13 to 25.

<sup>47</sup> [Para383 Report on the impact of the COVID-19 pandemic on equalities and human rights Scottish Parliament Equalities and Human Rights Committee March 2021](#)

<sup>48</sup> [Para385 Report on the impact of the COVID-19 pandemic on equalities and human rights Scottish Parliament Equalities and Human Rights Committee March 2021](#)

<sup>49</sup> [Para 355 Report on the impact of the COVID-19 pandemic on equalities and human rights Scottish Parliament Equalities and Human Rights Committee March 2021](#)

<sup>50</sup> [Scotland in Lockdown study \('Health and Social Impacts of Covid-19 Suppression for Vulnerable Groups in Scotland'\)](#) December 2020 The University of Glasgow, Scottish Government, p6

Despite the number of referrals to social work services being down, the number of Child Protection Orders (CPOs) taken in the last week in April 2020 increased by 38% from the 2019 level. *Includem* raised concerns that the impact of lower thresholds of risk results in more young people being taken into care. They advised the Equalities and Human Rights Committee that young people experiencing poverty are 10 times more likely to come into care. Children have been removed from their families at a time when the measures to protect their rights, enshrined in the UNCRC, have been reduced due to the Coronavirus (Scotland) 2020 Act, which extended the timescales for review of the granting of CPOs and Interim Compulsory Supervision Orders or Secure Care authorisations by Children's Hearings.<sup>51</sup>

We continue to raise our concerns with the Scottish Government at the introduction and continuation of the legislative and policy changes to the Children's Hearings System and the impacts on children's human rights which have resulted in some children being removed from their families and communities during the lockdown period and placed for lengthy periods of time in care, without sufficient protection of their human rights to direct and meaningful contact and association with their families and friends, and reduced opportunities to seek legal advice, advocacy or participation in reviews of decision-making.

### ***Exploitation and Trafficking***

A UN report on the Impact of the Pandemic on Human Trafficking found that children are being increasingly targeted by traffickers who are using social media and other online platforms to recruit new victims and profiting from the increased demand for child sexual exploitation materials. We note that, prior to the pandemic, concerns existed about the extent to which Scottish children were recognised as victims of trafficking, with only a small proportion of victims identified in Scotland being from within the UK, in contrast to the norm in both the rest of the UK and internationally.<sup>52</sup>

However, recently we have received concerns that some children identified by police and social services as victims of trafficking have been detained, charged and prosecuted and remanded to custody, pending trial. We are continuing to support young people and their agents on an individual basis and engaging with Scottish Government, Crown Office and Procurator Fiscal Service regarding the protection of these young people's human rights to care and protection and recovery from trauma, whilst in Scotland.

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<sup>51</sup> Para 369 [Report on the impact of the COVID-19 pandemic on equalities and human rights Scottish Parliament Equalities and Human Rights Committee March 2021](#)

<sup>52</sup> Child Trafficking in Scotland. Scottish Government. 15 October 2020 <https://www.gov.scot/publications/child-trafficking-scotland-research/pages/7/>

We are engaging with the Scottish Government to establish the extent to which existing legal protections are sufficient to ensure the non-punishment of child trafficking victims. As part of that process, it may be that there is a need to review Police practice around charging decisions.

We welcome SPA's rights-based approach in their preparations for their new Corporate Parenting Plan and welcome further discussions in preparation for incorporation of the UNCRC into Scots law.<sup>53</sup>

*'It would be helpful if Nicola Sturgeon could reassure care experienced young people that police are still Corporate Parents and they have a responsibility to make sure we are safe and can confide in the police. I worry that a lot of care placements will be breaking down and young people will feel helpless in these situations.'*  
(Young Person)<sup>54</sup>

## Protests, Gatherings and Peaceful Assembly

As highlighted in the SHRC paper for the IAG, children's ECHR rights to peaceful protest are echoed in the UNCRC for children under the age of 18, as autonomous rights to freedoms of expression, (Article 13 UNCRC); thought, conscience and religion (Art 14 UNCRC); privacy (Article 16) and particularly association and peaceful assembly (Art 15 UNCRC).

Attempts to restrict the rights in the interests of 'morals' have been rejected as incompatible with the right to freedom of association, as "operating from an assumption of children acting against their own interests". Special considerations of age and evolving capacities, risks of harm or conflict and balancing of the rights of parents exist when it comes to the enjoyment of these rights by children.

The UN Committee on the Rights of the Child has stressed the obligations on all states to facilitate protest, and to protect the safety of children in this context; to educate officials on children's protest rights; to encourage children to form associations, and to refrain from requiring children to seek parental consent to join associations." It was clear in the SQA examination protests in August 2020 that children's rights to protest were not only respected in the policing and engagement by Police Scotland but had a powerful impact on the Scottish Government's decision to reverse the public policy.

<sup>53</sup> As highlighted in the recent report SPA Corporate Parenting Plan preparation and consideration of the UN Convention on the Rights of the Child to the SPA Policing Performance Committee June 2021.

<sup>54</sup> Young person quoted in Independent CRIA Appendix 9, p56

Throughout the pandemic, children and young people have consistently demonstrated their commitment to obey the rules in order to protect public health. In September 2020, we heard directly from young students left anxious and distressed by the confusion about restrictions and changing guidelines, targeted at them where many felt terrified to leave their student accommodation for fear of disciplinary action.

As Professor McVie reports, there was then an increase in the proportion of FPNs issued to younger people from September 2020 onwards. Students, in particular were significantly impacted by the restrictions on their lives, where they were deprived of opportunities to socialise and engage in inter-personal contact, assemble peacefully, and the right to family life, in accordance with their human rights.<sup>55</sup>

In advance of the return to the new academic session this year, it is essential that Scottish Government and further/higher education institutions communicate directly, accurately, and early with students with a definitive position on the law, and any revised guidance.<sup>56</sup>

There has been much discussion in the IAG regarding Police Scotland's approach to policing demonstrations, protests and gatherings throughout the pandemic, and we are aware that these discussions will continue in preparation for the COP 26 Summit in Glasgow later this year, including at the IAG established to offer advice to Police Scotland on COP 26.<sup>57</sup> Children and young people have been present at some of the controversial gatherings, including the Rangers Football Club celebrations and Black Lives Matters and immigration protests. Whilst some of these children may have been exposed to violence, and even abuse during these events, we have been unable to establish a link between the events and any child protection or 'wellbeing' concerns being reported by Police Scotland.<sup>58</sup>

We would urge continuing consideration of children and young people's human rights to protest and peaceful assembly in Police Scotland's strategies and approaches, during and beyond the pandemic.

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<sup>55</sup> Brownlee K.,[2014]

<sup>56</sup> CYPCS Position Statement September 2020 <https://cypcs.org.uk/news-and-stories/position-statement-covid-restrictions-on-students/>

<sup>57</sup> the CYPCS is also involved in membership of the COP 26 IAG

<sup>58</sup> This may be in part due to the difficulties in obtaining disaggregated data from the Police Scotland Vulnerable Person Database.

## Incorporation of the UNCRC and other developments

Finally, as we reflect on the past year, we are struck that, across all areas of children's lives, they have felt excluded and ignored by decision-makers, we would urge all decision-makers in the justice system to be proactive in meaningfully engaging with children and young people.

*"Life-changing decisions being made during coronavirus like exams being cancelled has felt like playing a game and every time it should be our turn, someone skips over us and we end up left behind and forgotten. Feeling out of control with no say has made young people's mental health worse. We need to be involved in key decisions about our lives and it is even more important when life still feels scary and unclear for us all." ( Abigail, 15)*

Looking ahead, we are delighted to report that in March 2021, the Scottish Parliament unanimously passed the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. This fulfils Scotland's duty under Article 4 of the UNCRC which requires governments '... to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the UNCRC.'

Last month, the Bill was considered by the United Kingdom Supreme Court after being referred by the UK Law Officers, asking that the Court determine whether specific provisions of the bill are within the competence of the Scottish Parliament under Constitutional Law. Pending the judgment being handed down, we welcome and encourage public authorities, including Police Scotland and the Scottish Police Authority (SPA) to continue work towards implementing the UNCRC into policy and practice.<sup>59</sup>

This Bill is the most important piece of children's legislation in the history of the Scottish Parliament. Implementation of incorporation will require significant changes to legislation within the policing and justice systems, but, more importantly, should encourage a culture change in the way children are viewed within Scottish society.

Our ambition for the changes that incorporation will bring about for the children of Scotland is summed up by the *Poyum for Rights*<sup>60</sup>, written by Len Pennie (aka *Miss PunnyPennie*), commissioned by us to celebrate incorporation.

<sup>59</sup> See Fn51

<sup>60</sup> see Annex 1

In the words of one of our Young Advisors:

*“What we need is for people to listen, support and empower us. Don’t just put us on the kid’s table and then ignore us. Give us a seat at the table where decisions are being made about our futures and our lives...  
...and if bureaucratic structures mean that’s not possible, then it’s time for a new table...One where everyone has a voice, no matter their age.”<sup>61</sup>*

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<sup>61</sup> 'Promote, Protect, Defender' 2019 CYPCS Young Human Rights Defender.

## ANNEX 1: Poyum Fur Rights - Len Pennie

A wee disjasikit birdie sat upon a rowan tree, his face wis awfy crabbit an he  
wouldnae smile at me

I spiered tae thon wee birdie why his puss wis awfy sad,  
he telt me that the world wis dark an everything wis bad

He said I'm only wee ye see it's hard tae stay alive  
He said the big yins eat the wee yins and the wee yins cannae thrive

I asked him if he kent his rights an the birdie laughed at me  
Whit's a right gonnae dae when the worlds fu ae wrangs?

Why should ma rights matter tae me?

So I stared at thon wee birdie till he cracked a peerie smile  
Awright awright the birdie said, I'll listen fur a while  
Tell me about these rights ye hink that I'm supposed tae hae  
But ye'd better git a jildie oan, I dinnae hae aw day

I said ye hae the right tae bide in peace no matter whur ye're fae  
Be the way ye want tae be, say whit ye want tae say  
Ye hae the right tae mental health, fur help wae whit's inside  
The right tae climate justice protects the world in which ye bide  
The right no tae worry about the money that ye possess  
The right tae live a life that's guid an ayeways free fae stress  
The right tae play's another yin, they cannae gie ye work  
Ye hae the right tae pray annaw, mosque synagogue or kirk they maun protect ye  
physically so ye dinnae come tae hairm  
An though birdies dinnae gang tae school, bairns hae the right tae lairn

So I said this tae thon birdie an am sayin it tae you  
No jist because it sounds giy braw but also cause it's true  
Ye may no be the biggest but ye hae a voice an rights  
An there's them that would defend them, gie ye hauners in yer fights

So haud on tae the knowledge that fur aw the bairns oot there  
There'll ayeways be the champions, the wans who truly care  
Gin life seems hard jist mind these words tae heeze ye while ye're pushin:  
They cannae tak yer rights away, they cannae smoor yer fushin  
These champions willnae stop the fecht, they'll ayeways demand more  
Let yer rights heeze up yer smeddum and lit thon birdie ye will soar