

THE CHILDREN AND YOUNG PEOPLE'S COMMISSIONER SCOTLAND

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Abstract:

Instituția Comisarului pentru Copii și Tineri din Scoția a fost înființată în anul 2003 de către Parlamentul Scoției. Una dintre valorile fundamentale ale instituției este asigurarea participării copiilor și tinerilor în activitatea sa. Instituția este implicată în creșterea gradului de conștientizare și de înțelegere a drepturilor copilului în rândul copiilor și adulților din Scoția. În baza mandatului, Comisarul efectuează anchete în domenii cheie ale drepturilor copilului și promovează o abordare bazată pe drepturile omului în politicile, orientările și practicile de la nivel național. Ultimii ani au fost marcați de eforturile de a încorpora Convenția Organizației Națiunilor Unite cu privire la drepturile copilului în legislația internă scoțiană și de a promova adoptarea unor reglementări pentru a consolida protecția copiilor și tinerilor din toată Scoția.

Cuvinte cheie: Comisarul pentru copii și tineri, Convenția Organizației Națiunilor Unite cu privire la drepturile copilului, participare, integrare, vârsta răspunderii penale, apărători ai drepturilor omului

Résumé:

L'institution pour enfants et jeunes de l'Ecosse a été créée en 2003 par le Parlement de l'Ecosse. L'une des valeurs fondamentales de l'institution est d'assurer la participation des enfants et des jeunes à leur travail. L'institution est engagée dans des actions de conscientisation et de compréhension des droits de l'enfant par les jeunes et les adultes de l'Ecosse. Le Commissaire effectue des enquêtes dans les domaines clés des droits des enfants et promeut une démarche fondée sur les droits de l'homme en matière de politiques, d'orientations et de pratiques au niveau national. Les dernières années ont été marquées par les efforts d'inclure la Convention de l'ONU relative aux droits de l'enfant dans la législation interne écossaise et de proposer des réglementations améliorées afin de protéger les enfants et les jeunes de l'Ecosse.

Mots-clés: Commissaire pour les enfants et les jeunes, Convention de l'ONU relative aux droits de l'enfant, participation, intégration, l'âge de la responsabilité pénale, défenseurs des droits de l'homme

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Childhood is special and those in power have additional obligations in relation to children's human rights. The Commissioner has authority and powers to promote and protect the human rights of all children and young people in Scotland: that is everyone under 18, and everyone under 21 who is in care or care experienced. Children and young people do not have the same economic or political power as adults, and often struggle to access justice in the same way that adults do, so the Commissioner's role exists to champion their rights. The institution was created by a law passed by the Scottish Parliament in 2003¹, in line with principles set out by the United Nations.

According to the law the Commissioner must: a) make sure that children, young people and adults know about children's human rights, and make sure they understand them; b) make sure that people in power respect, protect and fulfil children's human rights; c) make suggestions relevant to children's human rights to improve policies, the law, and the way that people work; d) find examples of where adults work well with children and young people and share them with others who can learn from this; e) carry out research into children and young people's lives and let adults know when the rights of children and young people are not being respected; f) make sure adults listen to what children and young people have to say when decisions are being made that affect their lives.

I. INVOLVING CHILDREN AND YOUNG PEOPLE

As an office, we involve a diverse range of children and young people in our work. Participation is a core value of our office and is at the heart of everything we do. Not only does this uphold children and young people's rights, it ensures their views, experiences and ideas inform all areas of our work. It ensures we are holding ourselves directly accountable to children and young people across Scotland while working on their behalf.

Young Advisers

Their role is to advise the Commissioner and the office on all aspects of our work, help identify important issues for young people, and to inform current and future work. They play a key role in promoting the human rights of children and young people at a national and international level.

A year before the COVID-19 pandemic, led by our Young Advisers, we created a new four-year strategic plan which builds on the foundations of the last two years and continues to put the voice of children and young people at the heart of our work. The thematic issues children raised focus on poverty, mental health, and climate justice.

¹ Commissioner for Children and Young People (Scotland) Act 2003. The document can be found here: <https://www.legislation.gov.uk/asp/2003/17/contents>

Children and young people also led our international engagement with human rights bodies, with two of our young human rights defenders giving evidence to the UN Committee Against Torture, and four 10-year-old children from Avenue End Primary in Glasgow attending the UN Human Rights Council to work with the Special Rapporteur on Extreme Poverty.

A Toolkit for Empowering Child Human Rights Defenders

Over the past two years the Children's Parliament and the Commissioner have been working together to highlight the ways that children and young people in Scotland act as human rights defenders, and to show adults how they can best empower and protect them. This aligned with the UN Committee on the Rights of the Child's Day of General Discussion in 2018 which explored the theme of 'empowering and protecting child human rights defenders'.

In December 2019, we jointly launched a toolkit² and accompanying film³ for adults all over the world who work with children and young people. It explains the work we have done around empowering child human rights defenders, outlines our human rights-based approach and contains creative, participatory activities that will let you carry out a project of your own.

Giving evidence to the United Nations Committee Against Torture

A key element of our work is to support young human rights defenders by ensuring they have the tools they need and the protections they require in order to demand change. Children and young people must have the opportunity to share their own views and experiences directly with those responsible for decision-making at every level of governance, including international legal mechanisms such as the United Nations human rights treaty bodies and the Human Rights Council.

#ClimateStrike

The Commissioner supported children and young people acting as human rights defenders by taking part and addressing the Climate Strike in September 2019.

As an office, we were concerned to hear that some children and young people were being threatened with detention or other punishments for going on climate strike.

The Commissioner wrote to education leaders, urging them to reject this approach. The UNCRC clearly outlines children and young people's rights to

² The toolkit can be found at: <https://cypcs.org.uk/wp-content/uploads/2020/02/Children-Human-Rights-Defenders-toolkit.pdf>

³ https://www.youtube.com/watch?v=bkKaonU6fWc&feature=emb_title&ab_channel=childrensparliament

participation and freedom of association in peaceful protest; human rights defenders should not face reprisals for this, no matter what age they are.

II. OUR LEGISLATIVE PRIORITIES

We have had three urgent legislative priorities: the age of criminal responsibility, the full protection from physical punishment and the incorporation of the United Nations Convention on the Rights of the Child (UNCRC) into domestic law.

The Scottish Parliament passed legislation on the first two and significant progress was made on the third. The law raising the age of criminal responsibility from 8 to 12, while still falling well below the international minimum standard, did at least start a process of much-needed reform. The law providing children with full protection from physical punishment brings us into line with the majority of Europe and a growing number of countries globally. We have made significant progress on the incorporation of the UNCRC into domestic law, with a commitment to a bill which fully and directly incorporates the UNCRC to the maximum extent possible by the end of the Parliamentary session.

Age of Criminal Responsibility

We were deeply concerned the Age of Criminal Responsibility (Scotland) Act 2019 set the age of criminalisation at 12, two years below the international minimum standard set out by both the Council of Europe and the United Nations. This was despite direct international interventions from the Council of Europe Commissioner for Human Rights and the United Nations Committee on the Rights of the Child (CRC). Our office continues to advocate for the Age of Criminal Responsibility to be raised to ensure that the criminal law is not used to address harmful behaviour by children. This requires an immediate lifting of the age of criminal responsibility to at least 14 years old, and further work to raise the age higher and protect children from being criminalised.

When the Age of Criminal Responsibility (Scotland) Act was passing through the Scottish Parliament, we advocated strongly for the rights of 16 and 17 year olds to be referred to Children's Hearings and the Scottish Government is now consulting on this. This needs to happen as soon as possible to ensure that children are able to have their harmful behaviour addressed through a welfare-based system rather than a punitive one.

We have continued to work to make the justice system in Scotland more compatible with children's human rights. This included giving evidence to the Scottish Parliament on the Disclosure (Scotland) Act 2020 to ensure this law does not increase stigmatisation of children who have been in conflict with the law nor compromise the opportunities for children and young people later in life if they have a criminal record. We responded to the Scottish Sentencing Council's consultation on their guidelines for sentencing young people urging a human rights-based approach to sentencing. We recommended that sentencing

guidelines should explicitly and clearly reference the best interest of the child, and the UNCRC guidelines on the sentencing process need to be accessible, adequate and sufficient for children; and sentencing decisions should take account of the rights of children affected by the imprisonment of their parents.

Equal Protection

It is never acceptable to assault a child for the purposes of punishment. Article 19 of the UNCRC gives all children the right to be protected from physical injury. Until October 2019, Scotland was one of the few countries in Europe that still allowed parents to defend assaulting their child in this way, through the use of a legal defence known as justifiable assault. We have campaigned for a change in the law since our office was first established and this continued to be a priority issue for us into this reporting year. We had campaigned alongside children and young people, other human rights defenders and civil society actors for the Bill to be made law. We submitted written evidence setting out the human rights framework and the Commissioner had given oral evidence to the Equalities and Human Rights Committee in March 2018 where he advised the Committee that the position in Scotland was not compliant with the European Convention on Human Rights (ECHR) or the broader human rights framework. The Bill was passed significantly with a fixed commencement date which means it has become law on November 7th, 2020, 12 months after its royal assent.

Incorporation of the United Nations Convention on the Rights of the Child

Fully and directly incorporating the United Nations Convention on the Rights of the Child into domestic Scots law⁴ is the most important thing we can do to ensure children's rights are respected, protected, and fulfilled. Founded on the concept that all children should grow up in a family environment of happiness, love and understanding, the UNCRC contains a broad array of rights designed to ensure children are treated with dignity and fairness; that they are protected; that they develop to their full potential and can participate in their communities. It is the first legally binding international instrument to incorporate children's full range of civil, cultural, economic, political, and social rights, as well as aspects of humanitarian law. It also requires States to adopt comprehensive legislative measures to ensure that rights are protected. In 2021, the United Nations Convention on the Rights of the Child will be incorporated into Scots law. This is momentous and will help embed the culture of children's human rights that we need in Scotland.

⁴ Unlike many of the countries which have constitutional systems where international treaties become part of domestic law automatically, in the UK we require domestic legislation to give effect to international obligations.

Incorporation⁵ has been the highest priority for the office of the Commissioner since its creation in 2003, but Government has been reluctant to incorporate rights into law. This started to change in 2017, and in September 2018 the Scottish Government committed to bringing in a law to deliver incorporation of the UNCRC in Scotland. Over the last year we have been working with children and young people, civil society, and international experts to ensure that the Scottish Government's Bill was as strong as possible.

All children (everyone up to the age of 18) will benefit from incorporation. But it is the most disadvantaged children who will benefit most. The UNCRC requires the government to give special attention to disabled children, care experienced children and those at risk. It requires all available resources to be used to address poverty and provide services like mental health support.

In April 2019 the First Minister committed to incorporation before the end of this Parliamentary Session in 2021. In May 2019, a Consultation Paper was published by Scottish Government and we made it clear in our response that incorporation needed to be full and direct. **Full incorporation** means that the whole UNCRC should be in Scots law. **Direct incorporation** means that the legal text of the UNCRC is not changed when it is written into Scots law.

On November 20, 2019 - the 30th anniversary of the UNCRC - Deputy First Minister John Swinney made the commitment that Scottish Government would seek to incorporate the UNCRC to the maximum extent possible within Scots law, and that this would happen before the end of this Session of Parliament.

Throughout this journey towards incorporation, our office has continued to play an important role facilitating an expert advisory group for the development of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill.

A key part of our new strategic plan is ensuring that the new law is passed and fully implemented. New duties on public bodies will provide a framework for our work across Scotland for holding those in power to account and building a strong human rights culture.

III. SPECIAL FOCUS

Co-chair in the Independent Care Review's rights working group

Since its inception, our office has been committed to supporting the work of the Independent Care Review⁶ to achieve its goals of identifying

⁵ More information about our work on incorporation can be found here: Incorporation of the UNCRC – The Children and Young People's Commissioner Scotland (cy pcs.org.uk)

⁶ The Independent Care Review was commissioned by the First Minister of Scotland "to figure out how Scotland could love its most vulnerable children and give them the childhood they deserve". Fiona Duncan was appointed as chair. More information about the Independent Care Review can be found here: <https://www.carereview.scot/about/>

and delivering lasting change in the care system and leave a legacy that will transform the wellbeing of children and young people. The Commissioner co-chaired the Rights working group which explored how to embed a human rights framework within the context of the care system where currently rights are often violated. The group agreed upon a series of recommendations to ensure the rights of care experienced children and young people are known to them, respected and upheld:

- Incorporation of the UNCRC
- Human rights education for children and young people
- Support for the workforce to take a rights-based approach
- Advocacy and legal advice
- Rights-based inspection and regulation

In February 2020, the Independent Care Review launched a series of reports which highlighted a bureaucratic and complicated system where children and young people's voices and experiences are not listened to or valued. It included over 80 specific calls to action required, including the need to ensure listening to children and young people is always the basis of decisions made about their lives; that children and young people's rights must be at the heart of the care system along with a focus on building and maintaining life-long relationships.

The Scottish Government has fully accepted the Review recommendations and we are now working on the implementation.

Strategic Litigation and Investigation

We used our powers of investigation and strategic litigation to advocate for the rights of children in secure accommodation, for those deprived of their liberty and to inspect the Polmont Young Offenders Institution. Depriving children of their liberty must only be a measure of last resort, must take place for the shortest possible time and should always be in an age-appropriate facility. Every child deprived of liberty has the right to be treated with humanity, dignity and in a way that takes their needs into account.

In August 2019, we worked with the Equalities and Human Rights Commission Scotland (EHRC) as they could use their power to take legal proceedings on matters that are relevant to its functions to support a Judicial Review in the Scottish courts. Following this intervention - and after a series of productive meetings between our office, EHRC Scotland and the Deputy First Minister and Cabinet Secretary for Education and Skills, John Swinney MSP - we were pleased that the Scottish Government agreed to produce human rights-based guidance on restraint and seclusion with the involvement of children, young people and their families in its drafting. They also committed to developing a reporting mechanism to ensure consistent monitoring of restraint and seclusion incidents.

Our first investigation in 2018⁷ has had a massive impact, allowing us to lead a nationwide shift towards recognising restraint and seclusion as a children's human rights issue. Our investigation has since prompted the EHRC to launch their own enquiries in England and Wales and we have provided them with our expertise. It has also allowed us to publicly highlight the significance of this issue from a rights-based perspective with campaigners and policy experts across the UK and within the House of Lords.

Our office supported the Her Majesty's Chief Inspector of Prisons for Scotland inspection of Polmont Young Offenders Institute (YOI) and contributed to the report and mental health review published in May 2019. Our office was involved in the inspection process as a guest inspector focusing on the extent to which children's human rights are respected, protected and fulfilled in the facility. Our office's input to the inspection and report was critical in providing a children's human rights-based perspective on the matter and scrutinising the extent to which current mental health provision meets the particular needs and vulnerabilities of children in detention.⁸

In December 2019, we launched our second investigation into unlawful deprivation of liberty⁹. In Scotland, all chief social work officers have duties set out in the children's hearing legislation to consult with children who are being placed in secure care, to record their views and to notify children about the decision taken. We heard that these duties were not being complied with and we were concerned about children's participation rights in legal processes and the deprivation of their liberty as a result of a failure to meet these duties.

The legislation expressly provides that if this is not done, the decision to place a child in secure care is not valid. Any child kept in secure care beyond this point is being unlawfully detained.

Launch of Observatory of Children's Human Rights Scotland

In February 2020, we were delighted to be part of the launch of the Observatory of Children's Human Rights Scotland¹⁰ - an interdisciplinary

⁷ In March 2018, we investigated restraint (holding a child or young person to stop them moving) and seclusion (shutting a child or young person alone in a room and not allowing them to leave) in Scotland's schools. Following our investigation, we made 22 recommendations. The report can be found here: [No-Safe-Place.pdf](#) (cypcs.org.uk)

⁸ More information can be found here: [Statement on HMIPS Inspection Report into YOI Polmont - The Children and Young People's Commissioner Scotland](#) (cypcs.org.uk)

⁹ Investigation into unlawful deprivation of liberty: <https://cypcs.org.uk/investigations/investigation-secure-accommodation/>

¹⁰ More information on the Observatory of Children's Human Rights Scotland can be found here: <https://www.ed.ac.uk/education/rke/centres-groups/childhood-and-youth-studies-research-group/research/observatory-of-childrens-human-rights-scotland>

collaborative of organisations and academic experts working to drive change to fully implement children's human rights in Scotland. Since the launch, we have worked closely with the Observatory to respond to the human rights challenges presented by the coronavirus pandemic. We conducted an Independent Children's Rights Impact Assessment¹¹ on how emergency coronavirus measures have affected children and young people in Scotland - the largest impact assessment of this type to have been undertaken globally. Working with the Children's Parliament, a child-friendly version¹² was created.

Coronavirus

The United Nations Committee on the Rights of the Child warned of the grave physical, emotional and psychological effects of the Covid-19 pandemic on children and called on governments to activate immediate measures to mitigate these impacts. Our work over recent months has been almost entirely focused on that¹³.

In the first few weeks of lockdown, we focused our attention on the immediate human rights concerns for children and young people, using the Commissioner's powers to respond to the emergency legislation and guidance taking effect. The most pressing human rights concerns were schools closing, the disproportionate effect of the pandemic on families already experiencing poverty, digital exclusion and the impact on mental health.¹⁴

The Scottish Government has enacted emergency legislation in a way that has demonstrated how easily children are left with no voice, with policy created that directly affects children and young people with no direct input from them.

International law requires that any interference with human rights be lawful, necessary and proportionate; this requires the Scottish Government to ensure its decisions are grounded in a rights-based approach.

However, during the pandemic the Scottish Government has not routinely assessed the impact of law and policy responses to Covid-19 on children.

In the absence of a comprehensive approach to ensuring human rights compliance by the Scottish Government, the office commissioned an independent assessment of what the legal and policy response to the

¹¹ Independent Children's Rights Impact Assessment, see: <https://cypcs.org.uk/coronavirus/independent-impact-assessment/>

¹² For the child-friendly version please consult: <https://cypcs.org.uk/wp-content/uploads/2020/07/childrens-independent-cria.pdf>

¹³ See the Committee on the Rights of the Child (CRC) statement on 08 April 2020, https://yjlc.uk/wp-content/uploads/2020/04/CRC-statement-INT_CRC_STA_9095_E1.pdf

¹⁴ To find out more on the work during the coronavirus pandemic, please see: <https://cypcs.org.uk/coronavirus/>

coronavirus pandemic means for children's human rights in Scotland, which we published in July 2020.

We also worked to support the police and other bodies to adopt a human rights-based approach toward the enforcement of the new regulations. We recognised that service-based organisations concerned with children and families were under immense pressure to respond to the needs of those they worked with, and we highlighted these pressures and needs and focused attention on the implications for children's human rights.

We produced briefings for MSPs highlighting the human rights infringements and the steps to be taken to mitigate the potential future negative impacts of emergency legislation and guidance. We joined other experts on policing and human rights on the Independent Advisory Group overseeing the use of police powers during the pandemic. We worked with the Observatory of Children's Human Rights Scotland to conduct an Independent Children's Rights Impact Assessment on how emergency laws and policies around coronavirus have affected children and young people in Scotland. To date, it is the largest assessment of its kind to be done anywhere in the world around coronavirus laws and policies.

European Network of Ombudspersons for Children (ENOC) and European Network of Young Advisers (ENYA)

The Commissioner is a member of ENOC, the European Network of Ombudspersons for Children. The network of 43 members meets every year to discuss issues that affect children's human rights across Europe and share good practice which we can learn from in Scotland. ENOC works closely with the European Network of Young Advisers (ENYA) - a group of young people from across Europe who are passionate about defending children's human rights.

In 2019, the Commissioner was honoured to be elected as the next Chair of the European Network of Ombudspersons for Children, in recognition of the important work and achievements of the office. Being the Chair of ENOC will allow the office to fulfil its role of bridging Scotland with the international human rights framework. As Chair-elect, our office has taken on the leadership of the ENOC thematic issue of Children's Rights Impact Assessments (CRIA) for the year 2020.

CONCLUSION

Scotland has a strong tradition of protecting children's rights, but in many areas we haven't done well enough. That is particularly true for children whose rights are most at risk through factors such as poverty, disability, or not getting enough support.

Rights exist so children and young people can lead safe and happy lives, and that does not stop being true in difficult, uncertain times like these. We will stay true to our values by demonstrating Respect, Bravery, Independence, Participation and Leadership and continuing to be fierce champions for the rights of children and young people in Scotland.

When the UNCRC is incorporated into Scots law, we will have better mechanisms to hold decision-makers accountable. We will see better decisions, and resources being used more effectively to ensure children and their families get what they need. Incorporation will make sure that children and young people whose rights are most at risk will be protected.

What we know from other countries who have incorporated the UNCRC is that it will help bring about a real culture change. With new laws and policies in place, children and adults will need to understand what respecting children's human rights looks and feels like for children. Respecting children's human rights will no longer be a choice; instead, it will transform how we care for, listen to, love and value children and young people in our homes, schools and communities. We recognise that we have got some way to go but we do know Scotland is ready to make, and keep, these promises to children. We are ready to take this giant step forward.

We will launch the outcome of our investigation into secure care and will continue to use strategic litigation as a means to safeguard rights children's human rights in the justice system.

Chairing the European Network of Ombudsperson for Children for 2020-2021 will ensure that we are connecting the global human rights framework with our work in Scotland and that we are able to support children and young people to link and work with peers from other countries on human rights issues. It is of no surprise that ENOC's theme for the next year is on the recovery from Covid-19.

Looking ahead, we will continue to work with children, young people and civil society partners to ensure that the Scottish Government fulfils its human rights obligations to children. We will continue to have children and young people at the heart of our work, with our group of Young Advisers shaping and influencing our direction throughout the year. We will look to ensure that children and young people have meaningful opportunities to share their views and experiences with decision-makers at local, national, regional and international levels.

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