

Jenny Gilruth MSP, Cabinet Secretary for Education and Skills

Shirley-Anne Somerville MSP, Cabinet Secretary for Social Justice

Michael Matheson MSP, Cabinet Secretary for NHS Recovery, Health and Social Care

Angela Constance MSP, Cabinet Secretary for Justice and Home Affairs

Natalie Don MSP, Minister for Children, Young People and Keeping the Promise

Maree Todd MSP, Minister for Social Care, Mental Wellbeing and Sport

Via email: scottish.ministers@gov.scot

23 November 2023

Dear Cabinet Secretaries and Ministers,

Statutory Framework on Restraint and Seclusion

We are writing to ask that you identify a suitable legislative vehicle through which to put in place a coherent statutory framework on restraint and seclusion across all settings in which children are under the care and/or supervision of the State.

We consider that this would need to include as a minimum early years, education, residential and secure care, health and mental health settings, as well as prisons and custody environments. The framework should be human rights based and designed to ensure consistency of legal protection for children. It should make provision for the scaffolding and supports that we know are necessary for rights respecting practice to be embedded such as training, reflective practice, and children's participation in post-incident reviews. It should ensure a consistent approach to recording and monitoring of incidents, to enable practice development. It should make provision for effective oversight and regulation. This framework would be implemented by setting-specific practice guidance and provision of appropriate levels of staff support.

Over the last five years it has become increasingly clear that children's experiences of restraint and seclusion are varied depending on the setting and sometimes even the local authority area in which they find themselves at any given time. However, while there is a lack of consistency in experience, the human rights that are engaged, and the legal protections that are required to be adhered to are common to all settings.

The Equality and Human Rights Commission (EHRC) published a Human Rights Framework for restraint in 2019. This applies to England, Scotland and Wales and has already been used to inform policy and legal developments in England and Wales.

Education

As you know, in 2018 the office of the Children and Young People's Commissioner published its investigation report "No Safe Place" into restraint and seclusion in Scotland's schools. The investigation found that there was a need for clear and consistent policies and guidance, along with national recording and inspection mechanisms. These needed to be supported by practice and culture change, along with effective mechanisms of scrutiny and accountability.

The discussions with Scottish Government and the EHRC that followed led in 2019 to a ministerial commitment to introduce non-statutory guidance, and to review its operation within the first two years. Unfortunately, that commitment has not been delivered, with no guidance having been published, still less implemented.

In addition, since 2018 the review into the handling of school assault allegations in the Borders by Andrew Webster QC, Enable's 'In Safe Hands' report, and research published by the Challenging Behaviour Foundation (CBF) and Positive Action and Behaviour Support in Schools (PABSS) has further reinforced the need for Scottish Government to act on this matter. Daniel Johnson MSPs' proposed members' bill also puts many of these issues in sharp focus.

An EHRC investigation in England and Wales has prompted government responses; the Department for Education will include mandatory recording and informing parents of any physical restraint alongside new guidance on the use of force in schools and Welsh Government has published a cross

sectoral Reducing Restrictive Practices Framework. Northern Ireland has succeeded in developing draft statutory guidance following on from an investigation by the Northern Irish Commissioner for Children and Young People. We strongly encourage the Scottish Government to emulate the progress made elsewhere in the UK, and ensure at the very least a parity of protections for children in school settings.

Care

In 2020, the report of the independent Care Review said “Scotland must strive to become a nation that does not restrain its children.” It went on to say that “Schools in Scotland must also not exacerbate the trauma of children by imposing consequences for challenging behaviour that are restrictive, humiliating and stigmatising. This includes seclusion or restraint....” And that “...all restraints and use of seclusion must be recorded and reported on so that Scotland can understand its use and monitor progress towards its cessation.”

The Plan 2021-24 provides that “All care experienced children, wherever they live, will be protected from violence and experience the safeguard of equal protection legislation. Restraint will always be pain free, will be used rarely, and only when required to keep a child safe. There will be well communicated and understood guidance in place that upholds children’s rights and reflects equal protection legislation. The workforce will feel supported to respond to behaviour in a trauma informed way that reflects a deep understanding of the children in their care.”

The June 2023 report of the Promise Oversight Board noted that; “While there is an ongoing commitment to pursue culture change across the

residential care sector for children and young people, this effort is not consistent across provision and children's experiences with restraint continue to differ. Responses to the consultation on physical intervention in school highlighted the challenges around consistency of recording, and there is no single agency taking responsibility for data on the use of restraint...The 'Rethinking Restraint' pilot has been able to demonstrate impact on two levels: use of restraint is reducing in the pilot organisations; and it is shining a light on the levers of change that are held by Scottish Government and must be deployed for Scotland to be a nation that does not restrain its children. We urge sectors from justice to education to use the learning from the pilot."

Scottish Ministers have committed collectively and individually to 'keep the promise'. In order to ensure that care experienced children and young people are protected from unlawful and harmful restraint in all settings, it is necessary to align legal protections, guidance and supports for the workforce. Incidents must be recorded and monitored consistently, and the learning from pilot projects given the support of law where necessary to ensure they are embedded in practice.

Mental Health

In 2022, the Mental Health Law Review's report noted that "There are no specific legislative safeguards for restraint and seclusion..." It recommended that "The Scottish Government should propose legislation for a national register of restraint to be set up and maintained by a central public authority which is capable of hosting the exchange of data between multiple public authorities, and which is capable of reporting publicly on

trends in data from all of those authorities”, and that “The Scottish Government should co-ordinate further work on the use of restraint and isolation to ensure consistent standards across education, healthcare, childcare and justice settings, which reflect human rights-based best practice.”

In response to the Review, the Scottish Government said that it “will particularly seek to provide more effective human rights safeguards where non-consensual care and treatment and other restrictive practices are in use and work with others to improve the legislative framework to realise these aims.”

However, improving the legislative framework on mental health in isolation from those applying to other settings in which children are restrained and secluded would be a missed opportunity and not consistent with the recommendations of the Review.

Domestic law obligations

If public authorities are not collecting the right information to enable them to understand the impact of their restraint policies and practices on children from different groups, they risk not meeting their legal requirements under the Public Sector Equality Duty. This duty requires public authorities to consider how to eliminate unlawful discrimination and promote equality of opportunity for all children and young people.

International law obligations

Earlier this year the UN Committee on the Rights of the Child published its most recent set of Concluding Observations. It called on the Scottish Government to:

“Regularly collect, analyse and publish disaggregated data on the use of stop-and-search checks, harmful devices, seclusion, restraint, solitary confinement and isolation on children;

“Take legislative measures to explicitly prohibit, without exception, the use of... (iii) solitary confinement, isolation, seclusion and restraint as disciplinary measures in schools and alternative care and health settings;

“Develop statutory guidance on the use of restraint on children to ensure it is used only as a measure of last resort and exclusively to prevent harm to the child or others, and monitor its implementation;

“Explicitly prohibit the use of restraint and seclusion in educational settings and adopt a child rights-based approach to addressing violence or other disturbances in schools, including by prohibiting the presence of police in schools and providing regular training for teachers on relevant guidance for addressing such disturbances in a child-sensitive manner”

In addition, the UN Committee on the Rights of Persons with Disabilities, in its last review of the UK in 2017, called on the Scottish Government to:

“Adopt appropriate measures to eradicate the use of restraint for reasons related to disability within all [...], as well as practices of segregation and isolation that may amount to torture or inhuman or degrading treatment;

“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”

Our five organisations fully support the Committees’ calls and encourage Scottish Government to now identify how they will be taken forward through human rights-based legislation.

Please respond to Nick Hobbs, Head of Advice and Investigations at the Children and Young People’s Commissioner Scotland, via email:
nick.hobbs@cypcs.org.uk.

Yours sincerely,

A handwritten signature in black ink that reads "Nicola Killean". The signature is written in a cursive, flowing style.

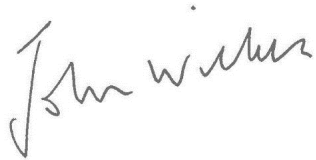
Nicola Killean, Children and Young People’s Commissioner Scotland

A handwritten signature in blue ink that reads "Jan Savage". The signature is written in a cursive, flowing style.

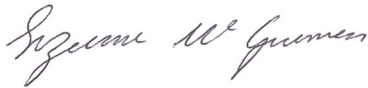
Jan Savage, Executive Director, Scottish Human Rights Commission



Fraser McKinlay, Chief Executive, The Promise Scotland



**John Wilkes, Head of Scotland, Equality and Human Rights
Commission**



**Suzanne McGuinness, Executive Director (Social Work), Mental
Welfare Commission**