

Witness Name: Nicola Killean

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Exhibits: NK/01 – NK/85

Dated: 09 July 2025

UK COVID-19 INQUIRY

WITNESS STATEMENT OF NICOLA KILLEAN OBE, CHILDREN AND YOUNG PEOPLE'S COMMISSIONER SCOTLAND

I, Nicola Killean, will say as follows: -

1. I am Nicola Killean. Personal Data I am based at Bridgeside House, 99 McDonald Rd, Edinburgh EH7 4NS.
2. On 26 April 2023, the Scottish Parliament passed a motion nominating me as Commissioner for Children and Young People in Scotland. I was appointed by His Majesty the King in accordance with the Commissioner for Children and Young People (Scotland) Act 2003 for a period of six years beginning 16th August 2023.
3. This statement, and indeed the terms of the Inquiry, covers the office's work during the period in which my predecessor, Bruce Adamson, was Commissioner. I therefore have no direct personal knowledge or recollection of the work outlined here. This statement draws on Mr Adamson's own statement to the Inquiry, on the recollection of staff, and on the documents available to me. As I am referring to activity during his term, where I use the term "the Commissioner" I am referring to Mr Adamson. For ease of reading, I use the term "we" to refer to the office, not to suggest that I had any personal involvement.

Role and responsibilities

4. My office is an Independent Children's Rights Institution (ICRI), established by the Commissioner for Children and Young People (Scotland) Act 2003 (the 2003 Act) in line

with the United Nations Paris Principles and the terms of the Committee on the Rights of the Child's (CRC) General Comment Number 2. I am appointed by the Crown on the recommendation of the Scottish Parliament, meaning my office is fully independent of both the UK and Scottish Governments. Further protection of my independence is provided in Schedule 1, s2 of the 2003 Act.

5. Recognising the importance of placing children and young people at the heart of our work and at the start of the title, my office adopted a new working name in 2015 as the Children and Young People's Commissioner Scotland. While my legal title remains "the Commissioner for Children and Young People in Scotland", I am generally known as the Children and Young People's Commissioner Scotland.
6. The general function of the Commissioner is to promote and safeguard the rights of all children in Scotland, that is everyone up to the age of 18. My mandate also covers young people up to the age of 21 who are care-experienced. In doing so I give particular attention to the United Nations Convention on the Rights of the Child (UNCRC). In order to do this, I have powers to review law, policy and practice and to take action to promote and protect rights, including through investigation and strategic litigation.
7. Section 4(2) of the 2003 Act provides that, in exercising my general function I am to, in particular
 - "(a) promote awareness and understanding of the rights of children and young people;*
 - (b) keep under review the law, policy and practice relating to the rights of children and young people with a view to assessing the adequacy and effectiveness of such law, policy and practice;*
 - (c) promote best practice by service providers; and*
 - (d) promote, commission, undertake and publish research on matters relating to the rights of children and young people."*
8. This must of course be read alongside other parts of the 2003 Act, including the requirement in s6 to "...encourage the involvement of children and young people in the work of the Commissioner", and in light of the resources provided to my office by the Scottish Parliament. The Act does not therefore require me to engage on every piece of

legislation, policy or practice – that would simply be impossible; I would require an office many times larger than the one I currently have. Rather we prioritise the issues the office focuses on via our strategic planning process, which is informed by active engagement with children and young people across Scotland. For example, our Strategic Plan 2024-28 sets out our approach to delivering on our statutory functions and making best use of our available staffing and budget. I set out later in my statement the process we made use of during the pandemic, as our Strategic Plan for 2020-24 had not anticipated Covid and we needed to readjust at pace to the onset of the pandemic and the State response.

9. At its heart, my role is to hold the UK and Scottish Governments to account against their international and domestic human rights obligations. When we speak to children and young people, we often explain that when the UK signs up to international conventions like the UNCRC, it is making a series of promises about how it will treat children. The role of my office is to make sure those promises are kept.
10. In line with my statutory responsibilities, my office seeks to involve children and young people directly in all aspects of our work. Often this is through our standing Young Advisors Group whose members played a significant role in our work during the period covered by the Committee's Inquiry, despite the challenges inherent in remote participation and the impacts they were facing in their own lives. I want to pay tribute to their contribution and will discuss a number of specific examples later in this statement.

Key members of staff

11. At the beginning of the pandemic, my office consisted of 15 FTE staff members, split across four teams; Strategy, Advice and Investigations, Communications, and Corporate Services. The following members of staff are those whose names appear most frequently in the evidence bundle attached to this statement. That is not to diminish the role or contribution of other staff members, simply to acknowledge that some were more closely and visibly involved in the office's work with the Scottish Government and the Scottish Parliament during the period covered by the Inquiry.
 - Nick Hobbs, Head of Advice and Investigations
 - Gina Wilson, Head of Strategy (from 13 July 2020)
 - Ezmie McCutcheon, Head of Communications
 - Megan Farr, Policy Officer

- Maria Galli, Legal Officer

Covid-19 as a children's human rights crisis

12. The COVID-19 pandemic impacted every aspect of children's lives in Scotland and across the world. It was a human rights crisis and very quickly recognised as such by international human rights organisations.

13. On 6 March 2020, the UN High Commissioner for Human Rights, Michelle Bachelet described it as "essential that governments introducing measures to impede the spread of the coronavirus, COVID-19, undertake a range of additional actions to reduce the potentially negative impact such measures may have on people's lives." She went on to stress the need to "protect the most vulnerable and neglected people in society, both medically and economically" and warned that "Lockdowns, quarantines and other such measures to contain and combat the spread of COVID-19 should always be carried out in strict accordance with human rights standards and in a way that is necessary and proportionate to the evaluated risk -- but even when they are, they may have serious repercussions on people's lives". (NK/1 [INQ000146883])

14. On 16 March 2020, a United Nations panel of human rights experts reiterated that even in a pandemic, all interferences in individuals' rights and freedoms through legislative restrictions must be justified, necessary, proportionate and time limited in accordance with international law. They urgently reminded States:

"...that any emergency responses to the coronavirus must be proportionate, necessary and non-discriminatory... [t]o prevent such excessive powers to become hardwired into legal and political systems, restrictions should be narrowly tailored and should be the least intrusive means to protect public health." (NK/2 [INQ000146882])

15. It was clear from the very earliest days of the pandemic that decisions would have a life-long impact on a generation of children and the need to take a human rights-based approach was a key feature of my office's work throughout the pandemic.

16. On 8th April 2020, the UN Committee on the Rights of the Child (CRC) warned of the "grave physical, emotional and psychological effect of the COVID-19 pandemic on children". It called on governments to respect children's rights when taking measures to

tackle the pandemic. The Committee identified 11 areas which required attention including; ensuring the move to online learning did not exacerbate pre-existing inequalities, the need for creative solutions to fulfil rights to play, leisure and recreation, wherever possible to release children in all forms of detention, and to provide children with the opportunity to participate in key decisions made in response to the pandemic. (NK/3 [INQ000146829])

17. For understandable reasons, the Scottish Government's initial focus was on rights to life and physical health. However, the longer the crisis went on, the more important it became to consider the impact on other human rights. For example, rights to education, mental health, family life, and protection from violence, neglect and abuse.
18. While the commencement of lockdown took place on an emergency basis, the periods of formal restrictions and subsequent impact on children persisted for many months and years subsequent to that and the long-term impacts are still felt at the present day. Public bodies and service providers had a duty to take a rights based approach to respond to the needs of children and young people when performing their functions. In line with my statutory duty to promote good practice, I will highlight examples of public bodies who did take a child rights based approach. However, I have grave concerns over the failures of many public bodies including both the UK and Scottish governments, and the resulting breaches of children's rights. It is imperative we learn lessons for the future.
19. In particular I share the concerns expressed by my predecessor Bruce Adamson in his witness statement about:
 - The extent to which children were negatively impacted by the Covid restrictions and continue to feel the impact to this day
 - The failure to recognise children as rights holders, even in areas such as education where consideration of their rights ought to have been front and centre
 - Inconsistent rights protections including definitions of "child" that were not UNCRC compliant (for example by excluding 16/17 year olds from legal protections).
 - Failure to involve children and young people in decision-making.
 - Legislation, guidance and policy made too often without properly assessing the impacts on children's human rights and without sufficient scrutiny.

- Failure to adequately mitigate the disproportionate impact of the pandemic and the State response on children whose rights were already at risk, for example those in places of detention
- Limited official communication directed at children and young people.

General Approach

20. Lockdown was formally announced on 23 March 2020; my office had already transitioned to working from home and agreed a flexible approach to work for staff with childcare or other caring commitments in order to maximise our capacity.

21. My staff were working exceptionally hard from the first day of lockdown. I echo the tribute paid to them in my predecessor's own witness statement. They worked long and unsociable hours in order to continue delivering the office's statutory functions during the biggest human rights crisis in the office's history. In doing so, they contended with the challenges of home education, childcare and other caring responsibilities, illness, vulnerability and the need for self-isolation. I trust the Inquiry will provide a chance for Scotland to reflect on how hard people worked, in the NHS, and across every part of our communities, often behind the scenes, to ensure that public services were delivered and human rights were protected. In particular, the significant sacrifices that children and young people made to support public health should be properly recognised.

22. The office had just finalised its 2020/21 Delivery Plan, which meant that the Commissioner and Senior Management Team had to begin immediate discussions on reprioritisation. They recognised that some functions required to be maintained (albeit in a slightly different form); for example the advice function continued to operate throughout the pandemic despite enormous pressure caused by a doubling of call volumes, and was an important source of intelligence on emerging issues. Other work, for example the investigation into Secure Care, had to be paused, while the office's Strategy/Policy function had to reorient significantly towards pandemic-related issues and legislation whilst maintaining the ability to conclude existing work that was progressing through the Scottish Parliament for example the Disclosure (Scotland) Act 2020 which passed on 10 June 2020 and the Children (Scotland) Act 2020, stages 1 and 2 of which were considered during the initial lockdown. Our approach to

reprioritisation was determined by a recognition of the human rights emergency the pandemic represented, the terms of our founding statute, the human rights framework, and our available resources. These considerations shaped the office's approach right through the pandemic. (NK/4 [INQ000146823])

23. The office set out its priorities as follows:

- Provide accurate, comprehensive, human rights-based information to support children, young people and families through the Covid-19 pandemic.
- Take action to protect children whose rights are most at risk.
- Fulfil the office's accountability role by scrutinising the content and use of emergency powers.
- Adapt the delivery of our existing projects where possible, particularly those with urgent deadlines, or those which would be of most benefit to children and young people during the pandemic.
- Ensure financial, governance, IT and HR systems continue during Covid-19 pandemic.
- Ensure risk is mitigated and the office runs lawfully and effectively during Covid-19 pandemic.

Early positioning and communications

24. The office's approach from the start was that its response to the pandemic had to be framed through a recognition that the situation was a global human rights crisis as well as a public health one. This was reflected in its work domestically and at an international level, through early and consistent public messaging, including through the media and in communications with decision makers.

25. The office's work in the early part of the pandemic illustrates the unique role played by an ICRI in protecting and promoting human rights. Children have less political and economic power than adults, which means their rights and interests can easily be lost, deprioritised or side-lined by decision-makers. This is true at the best of times, it is doubly so during a human rights crisis, when decisions are being made at pace and in rapidly changing circumstances.

26. In the early days of the pandemic, the office focused on setting down an early marker about the need for a human rights-based approach to the pandemic response. The then-Commissioner wanted to ensure that the legitimate focus of government on rights to life and health was balanced by a recognition of the other human rights engaged and impacted by key decisions.
27. The Commissioner engaged regularly with the broadcast media in the early months of the pandemic. In a BBC Television interview on 19 March he supported the Scottish Government's decision to take preventative measures but called for a rights based approach which ensured focus on children's education, adequate standard of living, play and cultural activities, rights to respect for family life, and to supporting children's mental and physical health alongside the protection of life and health necessary in relation to covid. By April he was raising concerns that the Scottish Government was failing to take a rights based approach and support and prioritise children's rights. Throughout May, June, and July he reiterated these concerns in the broadcast media.
28. The office took a proactive approach to delivering its statutory functions, focusing on issues where it could make an immediate impact, and where rights were most at risk. In doing so, the Commissioner and his staff were mindful of the enormous pressures under which the Scottish Government and public bodies were operating, and the potential that created for confusion, for unintended consequences, and negative impacts on children's human rights. This was further compounded by the sometimes divergent policies and approaches adopted by the UK and Scottish governments, for example in relation to school closures, timing and extent of lockdowns, and associated regulations on matters like contact and quarantine.
29. The office also had to ensure that it balanced the legitimate role that an ICRI can play in supporting government and public bodies to understand and deliver on their human rights obligations, with the need to retain its essential independence and accountability function.
30. The office recognised that in order to be able to play its accountability role to the greatest effect, it would need to gather intelligence from across the country on how the pandemic, and the State response to it, was impacting children and young people. It was aware that rushed legislation with limited time for parliamentary or public scrutiny

creates risks, both of unintended consequences and of significant gaps between intent and implementation.

31. Starting in the first week of lockdown the office contacted key stakeholders in the children's sector and used the information they provided on an ongoing basis to populate an Action Log. This allowed the Commissioner and staff to prioritise key issues and identify children and young people whose rights were most at risk during the pandemic. We had contact with organisations including Who Cares? Scotland, Children 1st, Enable Scotland and One Parent Families Scotland via email and telephone call. Despite the huge pressures civil society was under at the time given the role many of them play in delivering public services, engagement was positive and constructive. The issues they raised were added to the Action Log and regular discussions were undertaken as to how the office might respond, for instance by raising concerns with Scottish Government. Immediate risks were identified for disabled children and young people, children in the care and justice system, young carers, and those for whom there were safeguarding or child protection concerns. This intelligence informed briefings on the emergency legislation and the issues raised with Scottish Government. I will discuss those matters in more detail later in this statement.
32. We were also mindful of the important role the office could play in communicating rights-based messages to children and young people. We approached issues from a human rights perspective, whereas official communication from UK, Scottish and local government tended to focus on public health messaging. It was important that the Scottish Government held two press conferences in March and April 2020 aimed at young people. This kind of action helped to send a clear message that children and young people and their concerns were important to decision-makers. However, the bulk of official communication from the UK and Scottish Government was directed at adults.
33. The office's unique independent role placed us in an ideal position to try to some extent to fill that gap and also to ensure this wider consideration of rights was part of the message that children and young people heard from very early on.
34. Having worked with children and young people in 2019 and into 2020 to create a new website, we launched it in March 2020 at the beginning of the pandemic. This proved to be an extremely useful asset to help navigate a global pandemic as we were able to quickly respond to emerging issues – whether raised in the media, the UK or Scottish

parliaments, via our advice function, or by civil society partners - by publishing clear statements and policy positions framing government decision-making as children's rights issues. (NK/5 [INQ000146815])

35. To support children and young people and the adults around them, we created a coronavirus hub on our website of gathered resources, policy work, and answers to questions children had about their human rights in a time of crisis. This helped support children's right to receive information and to the best physical and mental health possible by providing information about coronavirus to help alleviate children's worries around the pandemic. (NK/6 [INQ000146817])

36. We used our website and online platforms to share helpful information for children, young people and adults. On 23 March 2020 to coincide with children's first week of learning at home with parents and carers, we published a blog by one of our Young Advisers, who as a long-term home learner shared her most interesting and engaging free learning resources for families to use. (NK/7 [INQ000146820])

37. The UNCRC recognises that parents and carers play an important role in supporting children to access their rights. During the pandemic, parents had to take a much more active role in helping to access rights to education, stepping into a space that for most families would usually be occupied by schools and teachers. We felt that most parents would welcome assistance with that task. While schools worked to create structured remote learning materials for younger children, parents and carers were left to manage at home. To support them we created a series of fun, animated films to support parents and carers to explore activities on rights. Called 'Learning at home with the Commissioner' the activities covered introductory information on rights, including to play, to health, to be safe and about the role of the Commissioner.

38. It was critical to understanding the seriousness of decisions made about children's lives during the pandemic that these were framed as human rights issues. On 19 March 2020 as schools prepared to close to the majority of children, the Commissioner published an article on how adults can protect the human rights of children. This set out his urgent messages for the Government to ensure children's human rights in the pandemic; messages that had to be reiterated as it continued. School buildings closing to most children had a profound impact on their human rights. (NK/8 [INQ000146816])

39. Schools are not just places of formal education, but are places of community, where children and young people go to learn, but also where they exercise their rights to socialisation, play and health. Schools are often places where children feel safest – and where they access support. In the article the Commissioner set out what support was needed from the Scottish Government, including a roll out of digital support for remote learning to ensure that no children were affected by digital exclusion.
40. Access to the internet for children in rural and island communities and across Scotland where families who struggle to afford access needed to be a key priority (we raised this with the Scottish Government in April 2020) as well as keeping children safe from harm while they are at home with little access to the usual family supports from social work, healthcare and education. The Cabinet Secretary for Education, John Swinney MSP had just announced that the 2020 SQA exams would be cancelled, and young people needed reassurance, support and guidance for them to have their hard work and achievements properly recognised. The right to education and SQA decision-making around exams and appeals process is covered more fully later in this statement. (NK/8A [INQ000613914])
41. The Commissioner’s early media statements were focused on education, particularly on the need to recognise the wider impact on children’s rights of closing schools, on poverty, digital exclusion, vulnerability and food insecurity. This reflected the office’s approach to prioritising rights most at risk. (NK/9 [INQ000146832], NK/10 [INQ000146835])

Independent Children’s Rights Impact Assessment

42. Our work in the early part of the pandemic came together in the form of an Independent Children’s Rights Impact Assessment (CRIA). This was one of the most significant pieces of work undertaken by the office during the pandemic; it drew together many of the concerns we had about the initial State response, analysed flaws and gaps in the Scottish Government’s approach, made clear recommendations for improvement, and guided our pandemic-related work going forward. (NK/11, [INQ000146890]), NK/11A [INQ000648526], NK/11B [INQ000648525], NK/11C [INQ000648523], NK/11D [INQ000648527], NK/11E [INQ000648528], NK/11F [INQ000648519], NK/11G [INQ000648522], NK/11H [INQ000648521], NK/11I [INQ000648520], NK/11J [INQ000648524], NK/11K [INQ000648518].

43. One of our principal criticisms of the Scottish Government throughout the pandemic, but particularly in the early weeks and months, was a failure to properly impact assess emergency legislation and key policy decisions. As a consequence, children's rights were not being properly and fully considered. We decided that there was a need for that gap to be filled and for an example to be set for government.

44. The assessment was conducted in partnership with the Observatory of Children's Human Rights Scotland, allowing us to access a wide range of subject specialists on issues such as criminal justice, health, education and poverty. We deliberately framed the CRIA in terms of 11 recommendations made by the UN Committee on the Rights of the Child in its statement of 8 April 2020, in which it warned of the grave physical, emotional and psychological effects of the COVID-19 pandemic on children, particularly those in situations of vulnerability.

45. The aims of the CRIA were set out as follows:

- Observe and document children and young people's human rights issues in relation to legislation and policy during the pandemic response, as they apply to children and young people in Scotland.
- Anticipate issues and identify opportunities to embed children and young people's human rights in ongoing developments in regard to developing law and policy.
- Learn from the above, in terms of negative and positive implications for children and young people's human rights during crisis situations.

To our knowledge it was the first, and most comprehensive, impact assessment conducted anywhere in the world on pandemic-related law and policy and significantly informed our approach to prioritisation and engagement with the Scottish Government.

46. The independent CRIA identified significant concerns around decision-making and scrutiny and highlighted the impact on children and young people of the State responses to COVID-19 in Scotland. It drew out a number of key high-level recommendations in response to the issues raised in the CRIA, but also included a great deal of other valuable information and detailed evidence for decision-makers, parliamentarians, civil society and human rights defenders to engage with.

47. Most strikingly, despite the need to ensure that the best interests of children are a primary consideration in all actions concerning them (Art 3 (1)) and the UNCRC's

recognition that participation in decision-making (Art 12) is an enabling right, children were largely absent from the decisions that have so profoundly impacted their lives. One of the greatest failings during the pandemic response was the lack of recognition of children as rights holders rather than as passive objects of education, care or charity. The structures within which decisions are made need to be fundamentally rethought in order to enable children to take an active role in their own lives and communities. As one of our Young Advisors put it in July 2020; “Life-changing decisions being made during Coronavirus have felt like playing a game. Every time it should be our turn, someone skips over us and we end up left behind and forgotten.”

48. The CRIA also underlined that certain groups of children and young people were more adversely affected by measures than others, and that these adverse impacts were not always recognised or mitigated. It sets out clear lessons for the Scottish Government to learn from the early part of the pandemic.
49. No formal response was received from the Scottish Government but the Deputy First Minister was asked about the CRIA by the Guardian’s Libby Brooks at a press conference on 16 July 2020. He said that the Scottish Government was committed to hearing children’s voices and reflecting them in policy decisions. (NK12A [INQ000613910], NK12B [INQ000613911])

Emergency legislation

50. From the very start, there were significant frustrations for my office caused by the pace of legislation, as well as its complexity and scope. This meant virtually no opportunity to raise issues in advance or to understand the motivation behind particular legislative decisions. There was a need to devote significant time and resource to understanding the scope and content of emergency legislation, and then seeking to positively influence it where possible.
51. It was striking that the extent of the Scottish Government’s consultations when preparing emergency legislation tended to prioritise those who run and operate services at the expense of service users and those who speak for them. The consequence was that emergency legislation tended to serve the interests of public bodies. We saw little evidence of officials meaningfully scrutinising or challenging the demands made by public bodies in some areas. The diversity of views, opinions and accounts of lived experience from stakeholders and civil society that would normally inform the

development of legislation was absent. We were particularly concerned that the office was not consistently afforded opportunities to comment, even when our interest and concern about the subject matter was known to officials. At a time when Parliamentary scrutiny of such measures was limited, the role of human rights bodies like ours in safeguarding rights becomes all the more crucial. We welcomed the decision in *Article 39 v Secretary of State for Education* in which the court powerfully articulated the importance of meaningful consultation in protecting against arbitrary decision making. In Scotland, particularly in the earlier stages of the pandemic, these principles were honoured more in the breach than in the observance. We sought Counsel's Opinion on the emergency legislation to support our own analysis. (NK/13 *INQ000146818*)

52. For example, the decision to legislate for extended time limits for Additional Support Needs (ASN) decisions such as placing requests appeared to be driven solely by requests from local government with little pushback from ministers, or balance from alternative voices, particularly those of children. Similarly, the content of early release regulations appeared prompted wholly by Scottish Prison Service requirements to manage the prison estate, not by a human rights-based approach or consideration of the needs of children in prison who were not only acutely vulnerable, but largely disregarded by government across the course of the pandemic.
53. This was challenging in relation to primary legislation but became even more difficult once secondary legislation (SSIs) became the principal vehicle for legal change. There were a number of instances of SSIs not being published until after they had come into force both in Scotland and at UK level, which raised Rule of Law issues, and compounded confusion about what was guidance and what was law. Scottish and UK Ministers themselves sometimes confused the two in ways that were unhelpful, as did the media.
54. Use of the "made affirmative" procedure, to which I refer in more detail below, limited the extent to which the Parliament could effectively scrutinise regulations even where these were laid ahead of coming into force. MSPs were rarely provided with Children's Rights Impact Assessments of sufficient quality (where they were provided at all). Parliaments play critical roles as human rights guarantors and as such need the time, capacity and evidence to hold governments to account. CRIAs are a key part of that accountability model and give parliamentarians the information they need in order to question and challenge the exercise of executive power. While we acknowledge the

enormous challenge faced by both the Scottish Government and the Parliament, particularly in the early stages of the pandemic, it is our view that this contributed to legislative provisions that were not adequately scrutinised and not always fully justified or proportionate.

55. For similar reasons, we were critical of the Scottish Government's regular reports to the Scottish Parliament in which it sought to justify the ongoing necessity of the emergency measures. These did not properly engage with the legal tests or provide MSPs with the necessary evidence to perform their scrutiny role. (NK/12 [INQ000146898])

56. Nonetheless, we were able to quickly provide a briefing for MSPs on the Legislative Consent Motion regarding the UK Covid Bill, in which we recognised that although the pandemic provided a justification to limit certain rights, there was a need to be clear about the extent to which the bill transferred power to the executive and overturned or bypassed existing human rights protections. We noted that "it is at times of emergency and crisis that hard-won human rights protections are most vital, and most at risk". We also set out a clear expectation that scrutiny and accountability, particularly through the Scottish Parliament, was necessary to ensure that children's human rights were respected, protected and fulfilled. (NK/14 [INQ000146819])

57. Our briefings for the two Scottish Covid Bills were more detailed, raising a wide range of concerns about the necessity and proportionality of some elements of the legislation. In our briefing for the first Bill, we questioned "whether the case has been made out for all of the provisions set out in the Bill to come into force straight away. The Government's Children's Rights and Wellbeing Impact Assessment (CRWIA) does not adequately or fully set out the human rights impact of these provisions and the Policy Memorandum does not provide sufficient evidence that all of these changes to existing law are necessary at the present time, referring instead to the possibility that they might be." (NK/15 [INQ000146822])

58. The detail in the briefings for the second Bill (at Stages 1, 2 and 3) were informed by a wide range of third sector stakeholders, using a shared Google doc to "crowd source" intelligence and views about the way in which the provisions might impact on specific groups of children and young people, for example those in care. We then applied a human rights lens to those comments in order to prepare the final document. This informal consultation allowed us to consider a broader range of views than we would

otherwise have been able to given the timescale, and permitted organisations who would not otherwise have had capacity to engage in the parliamentary process a route to have their concerns considered and raised. (NK/16 [INQ000146836], NK/17 [INQ000146839])

59. At Stage 3 of the Coronavirus (No.2) (Scotland) Bill, we were able to secure an amendment (lodged by Ross Greer MSP) preventing 16/17 year olds from being subject to a Fixed Penalty Notice (FPN) should they breach lockdown regulations. Through our existing connections within the Justice Directorate and Police Scotland we were able to secure very welcome support from Police Scotland, and Scottish Government, both of whom recognised that a criminal justice approach to managing children's behaviour was neither appropriate nor likely to be effective. A subsequent analysis prepared by academics at the University of Edinburgh showed that around 250 16/17 year olds were subject to FPNs before this amendment came into force on 27 May 2020. We think it fair to assume that several hundred more would have been subject to criminal consequences over the course of the pandemic if not for this amendment. (NK/18 [INQ000146887])

General relationship with the Scottish Government

60. Our statutory functions, to promote and safeguard the rights of children and young people, determined the approach of the office from the start of the pandemic.
61. We received no advance notice from the Scottish Government that a lockdown was imminent; we found out at the same time the general public did. We were not consulted on this decision. Nor was our advice or input actively sought on key early decisions including the government's advice to local authorities to close schools. To my knowledge, the office had not been involved in any pandemic planning exercises.
62. Although subject specific meetings and discussions with officials began almost immediately post-lockdown (for example my predecessor Bruce Adamson met with the Scottish Government's Chief Social Work Adviser in April and May 2020 to discuss the importance of the Scottish Government taking a human rights-based approach, and to pick up specific questions around the emergency legislation) regularised contact took a little longer to set up. However, from 14 May 2020 onwards, the Commissioner and members of the Senior Management Team had weekly online meetings with senior officials in the Children and Families Directorate, each one following on from a meeting

of the Scottish Government's Covid Leadership Group (see below) This was the principal way in which we engaged with the Scottish Government at a strategic level throughout the period covered by the Inquiry. For the avoidance of doubt, all written communications with government at all levels were by letter or email. We did not use WhatsApp or any other social media/messaging app to communicate with the government in relation to covid decision making.

63. In terms of Ministerial engagement, there were several meetings with the Minister for Children and Young People. The Commissioner also met with the Minister for Equalities and Older People as part of a human rights roundtable discussion on 16 June 2020, at which human rights bodies discussed their key issues and concerns with the Minister, and with the Deputy First Minister at a Covid Recovery Roundtable on 24 August 2021. (NK/19 [INQ000146848])

64. We were invited to sit on the Scottish Government's Covid Leadership Group. However, we had made an early decision that we would continue with the standing office policy presumption not to sit on Government advisory or working groups. This was for a number of reasons; there is often a lack of clarity as to the purpose and impact on decision-making of these groups, the profusion of such groups even in normal times presents a significant capacity challenge, and the office's independent scrutiny role requires both independence and the perception of independence from government, meaning that in order to effectively hold Government to account we need to be able to independently scrutinise the whole decision-making process including advisory groups.

65. Instead, we asked to receive the papers and sought briefings on the work of the Group from the Director of Children and Families immediately after each meeting. This allowed us to perform our accountability role while maintaining our independence from government. We received the first set of papers, for the second meeting of the Group, on 14 May 2020 and the weekly briefing meetings commenced on the same day. The agenda for the weekly meetings was determined by; the discussions of the Covid Leadership Group, and any additional issues the office wished to raise at a senior level within government. The fluidity of the situation meant that formal agenda setting ahead of time was challenging. Consequently the Commissioner and staff agreed just prior to each meeting what we wanted to raise, and undertook a verbal debrief after the meeting to identify any actions for us.

66. In taking these meetings, it was important to be clear that even in times of crisis, and with the greatest respect to the hard work of civil servants, the office's accountability role is to challenge and scrutinise government to ensure that children and young people's rights are respected, protected and fulfilled. (NK/20 [INQ000146860])
67. Throughout, we retained a strong and consistent message on the need for human rights to remain central to government decision-making, and for the pressures of the pandemic not to result in hard-won human rights protections being discarded. We constantly referred Ministers and civil servants to the international human rights framework, and to the need to consider tests of lawfulness, necessity and proportionality. We also drew on live intelligence provided to us by NGOs, partners and professionals, for example through the Children's Policy Officers Network, as well as children and families via our advice function, to identify issues affecting specific groups of children, for example disabled children, those experiencing domestic abuse, care experienced children and young people and those living in poverty. This informed our policy work and engagement with Scottish Government officials.
68. The office's remit covers all aspects of children and young people's lives, which means dealing with a very broad range of Government directorates. We always need to prioritise the areas which we give attention to; an exercise that was doubly challenging during the pandemic when everything became urgent.
69. That, plus staff turnover within the civil service, means that established contacts can quickly become out of date. Covid exacerbated that experience, as staff were re-deployed within the Government at pace and with little external visibility. The simultaneous move to working from home meant that staff sometimes had difficulty identifying and contacting the right officials, particularly in the absence of a switchboard to direct calls and provide the correct contacts. This became easier as time went on, but it did impact on our ability to engage with government in the early weeks of the pandemic.
70. The Government's approach to us varied by Directorate and by Team. There was good, early and proactive engagement from officials working on Children's Hearings, the Children (Scotland) Bill and the UNCRC Incorporation Bill. These teams took advantage of established relationships with the office, proactively contacted staff and

demonstrated a willingness to discuss thinking which was helpful, and which recognised the risk of disconnect between policy and implementation.

71. There was also some positive early contact at our instigation with seconded staff from the First Minister's policy unit, which allowed for specific issues within guidance and regulation to be addressed. Those relationships would provide some of the most effective routes to influence and engage with Government at short notice on key priority issues.
72. However, this approach was not consistent. There were frustrating experiences when trying to advocate on some issues, for example, children in the criminal justice system, and specifically early release from detention. A request to meet with the then-Justice Minister on this issue was declined, with a suggestion instead that appropriate contact would be with officials. Staff had to push to meet Justice Directorate officials on 4 May 2020 to discuss the Regulations. Unfortunately this took place after they had been laid in the Parliament and our concerns over early release for children in detention were therefore not heeded. The Commissioner wrote again to the Justice Secretary to express his disappointment on 15 May 2020. I discuss the further work the office undertook in relation to these issues in more detail later on in this statement). (NK/21 [INQ000648517], NK21A [INQ000146837])
73. To some extent this is an issue that predates Covid. The level of understanding of, and respect for, children's rights within government varies considerably. For example there is sometimes a sharp differentiation between officials dealing with youth justice and those responsible for criminal justice. These teams sit within different Directorates and it can often feel like there is a significant gap in terms of recognising children as rights holders depending which part of which Directorate is responsible. It is worth noting however, that other parts of the Justice Directorate were more responsive and alive to children's rights concerns. As with so many other pandemic-related issues, Covid-19 threw these kinds of gaps into sharp relief and bridging them was a challenge.
74. Nonetheless, the proactive approach the office took to identifying and addressing children's rights issues in the early part of the pandemic had some notable successes, a number of which provide useful illustrations of the points I raise above. In particular, the common feature in many of these examples was a willingness from government officials to listen and act on our advice.

75. On 24th March, the then Chancellor of the Duchy of Lancaster stated on television news that children with separated parents were not allowed to move between their parents' homes. This was repeated by an official from NHS Grampian. We contacted Justice Directorate officials to request urgent clarification of the position in Scotland. We received clarification that this was not the case within 2 hours and Scottish Government officials ensured that guidance on their websites was accurate. This was reinforced by updated guidance on child contact orders from the Lord President of the Court of Session on 27th March.
76. In May 2020 we worked with colleagues at the Equality and Human Rights Commission (EHRC) and the Scottish Human Rights Commission (SHRC) to persuade the Chief Medical Officer (CMO) to amend recently issued clinical guidance on restraint. We were concerned that the guidance did not set out clearly enough the situations and patients that it applied to, and the legal framework and principles that must be followed to ensure that the use of restraint is lawful and upholds equality and human rights duties. Although the initial response from the CMO did not really engage with the concerns expressed, a follow up letter and a series of meetings through June, July and August elicited a much more positive reaction. In consequence the guidance was amended to address the issues we had raised, strengthening human rights protections for children in clinical settings. (NK/22 [INQ000146842], NK/23 [INQ000146843])
77. Very shortly after lockdown commenced, we began to receive information via NGO partners and through our advice function that parents of disabled children were unclear on the circumstances in which their children could leave the house for exercise. The UK regulations specified that exercise could only be taken once per day and were subject to a successful legal challenge on that basis and with respect to the ability to travel to take exercise. While Scottish regulations were not as prescriptive, early media reporting and UK government messaging left parents confused and risk averse, while there were also concerns at that early stage about the extent to which police officers might also be confused about the differences between UK and Scottish guidance. We had heard of instances where older children were challenged by Police when legitimately exercising or doing essential shopping. We contacted Scottish government officials on 9 April 2020, and secured an agreement to clarify the terms of the Scottish guidance, and to take steps to communicate it to parents. Amended guidance was published on 14 April 2020. (NK/24 [INQ000146826])

78. On 17 April 2020, Scottish Government officials approached us seeking views on a proposed SSI that made provision for a direction to be made on data sharing for a Covid-19 Purpose. This was to “remove legal uncertainty over whether it is permissible to share relevant data in order to be able to both monitor public health risks in near real time and impose requirements on persons to share in order to reduce the public health risks posed by the spread of [Covid-19] in Scotland”. It was to cover all public bodies and all registered providers of health and social care services, whether statutory or non-statutory. We raised concerns about the necessity of this measure, and posited a number of human rights concerns that would need to be considered, mostly around Article 8 ECHR and whether such data sharing was proportionate and necessary. As a result, the Scottish Government decided not to take the proposal forward. (NK/25[INQ000146830])

79. At a press conference on 16 September 2020, the First Minister trailed proposed changes to the law on gatherings outside. We contacted Scottish Government officials to discuss in more detail the benefits of taking a human rights-based approach, the need to mitigate potential disproportionate impact on disadvantaged groups, and to avoid as much as possible confusion for children and young people. The outcome was that we were able to support the Government to take more flexible approach for children. When the Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Amendment Regulations 2020 were published on 25 September 2020, they provided that children under 12 years of age were not to be included when counting the number of persons participating in a gathering indoors, and that they were not to be included when counting the number of persons or households participating in a gathering outdoors. This meant that children’s rights to play and socialise were better respected in law. (NK/26 [INQ000146863])

80. Similarly, in spring 2021, we provided Scottish Government with a briefing, at short notice, highlighting the specific impact restrictions on households meeting had on older young people, as a result of the different ways in which they socialise with their friends. Our briefing was informed by feedback we had received from our young advisers. This resulted in restrictions being amended to allow four children from four households to gather, rather than four children from just two households. (NK/27 [INQ000146884])

81. In March 2021, a number of concerned individuals and journalists contacted us about the law on hotel quarantine. We contacted Scottish Government officials and met to discuss the issue on 11 and 17 March 2021, following up with an email detailing the children's rights issues on 18 March 2021. The Regulations were amended via The Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 8) Regulations 2021, on 26 March 2021 to follow our suggestion that unaccompanied children be allowed to self-isolate at home with a parent/carers rather than in hotel quarantine. (NK/28 [INQ000146871])
82. While these successes were all delivered via engagement with officials, sometimes there was a need to engage with organisations outwith government, and even outwith the public sector, in order to mitigate the potential negative impact of decisions and actions on children's human rights. Given the level of scrutiny and uncertainty that prevailed particularly in the early part of the pandemic, even relatively throwaway comments from government sources could result in significant negative impacts. For example, in a press conference on 28 April 2020, Jason Leitch, the National Clinical Director, had responded to a question about whether face masks could scare children by saying that children should not be in shops.
83. This exacerbated concerns that had been expressed to us that parents had been subject to challenge when shopping with their children. We were also made aware of instances where children had been challenged, including by police, for legitimately shopping for household essentials on behalf of a parent. We contacted Scottish Government and they later confirmed that Mr Leitch had clarified his comments on Twitter and regretted expressing himself in the way he had. (NK/29 [INQ000146870])
84. However, we were concerned that this would not be sufficient given the press conferences were being widely reported. On 29 April 2020 we therefore wrote to the major supermarkets pointing out that there were a number of reasons why a parent might need to take a child shopping with them. We called on the supermarkets to ensure that their staff were trained, that information was posted at the entrance of their stores and that people abusing parents and children would be appropriately dealt with. This letter was generally received positively. (NK/30 [INQ000146833])
85. We contacted the supermarkets again in July 2020 to ask for sensitive application of the legal exceptions to face mask use, which had become mandatory for children over

the age of five on 10 July 2020. We noted that this would be particularly important for younger children and those with disabilities who had perfectly legitimate and lawful reasons not to wear a mask. Responses illustrated the confusion about the content of regulations in different legal jurisdictions, with some supermarkets responding from English HQs clearly not fully aware of the exceptions set out in Scottish regulations. (NK/31 [INQ000146852])

86. There were also circumstances where communication from the Scottish Government and others unhelpfully blurred the distinction between law and advice, and even suggested that law was in force before it was. For example, the announcement by the First Minister on 22 September 2020 that new restrictions would apply to indoor visits with other households in private dwellings had a significant impact on students who had recently changed their household by virtue of moving to student accommodation. The legal changes were announced as coming into effect from 23 September 2020. The Scottish Government website was updated to reflect the new regulations, and they were widely reported. However, the regulations giving effect to this change were not in force until 25 September 2020 and not publicly available until after they were in force, seemingly as they were subject to the “made affirmative procedure” and had not yet been laid in the Scottish Parliament. This raised obvious issues, as if a law is insufficiently accessible, foreseeable and clearly defined, attempts to enforce it could constitute a breach of Article 7 ECHR.

87. In the absence of clear and publicly available regulations, the confusing and misleading statements and comments to the media by the Scottish Government, Universities Scotland and individual universities made on 24 and 25 September 2020 resulted in students being given the impression that more legal restrictions applied to them than to other people, even though such additional restrictions had no basis in law. Disciplinary sanctions were threatened for students, even for those who acted within the law and within existing university disciplinary policies. This created entirely unnecessary anxiety and distress, with the most vulnerable children and young people most likely to be negatively affected. We received a number of contacts via our advice function from concerned students and their parents.

88. While we were able to secure clarity from Universities Scotland and the Scottish Government relatively quickly, with both insisting that they had simply been misunderstood, it illustrated the risks of government seeking to use public health

communications to change behaviour, and in so doing confusing the distinction between law and guidance in a way that risks breaching Article 7 ECHR. In correspondence with government officials at the time, we noted that Ministers should not tell people, or cause them to believe, that something is against the law when it is not. And people certainly could not be penalised for breaking a law that was not in effect. In this case there was also a risk of people believing that some restrictions (eg on children meeting), had been lifted when in fact they hadn't. That created a serious risk of people committing offences unknowingly. (NK/32 [INQ000146864], NK/33 [INQ000146867], NK/34 [INQ000146865])

89. In other cases, issues were caused by overly strict interpretation of Covid related restrictions. For example, shortly after schools reopened in August 2020, we received a number of emails and phone calls reporting that children were being denied access to drinking water. We issued a statement on 15 August 2020 making clear that legal duties on education authorities to provide drinking water were still in effect and that children's rights to access it should be respected. We also wrote to the Scottish Government asking them to provide clarity to schools on the matter. This appeared to resolve the bulk of the issues, though we still saw individual cases coming through our advice function. The issue demonstrated how rapidly and frequently changing regulations could be subject to well-intentioned over-interpretation by public bodies. (NK/35 [INQ000146858])

Relationship with the Scottish Parliament

90. The Scottish Parliament is a human rights guarantor; part of its purpose is to ensure that the State complies with its human rights obligations, particularly when seeking to pass legislation. We submitted evidence and briefings to the Parliament on the UK and Scottish Covid Bills, and in response to a range of different Committee inquiries. Of particular note are the following:

91. On 16 April 2020, alongside our colleagues at the Equality and Human Rights Commission (EHRC), and the Scottish Human Rights Commission (SHRC), we called for the Parliament to undertake an inquiry to identify individuals and groups who were disproportionately impacted by Covid-19 and measures related to tackling it, to identify actions that Scottish Government and other public bodies need to take to minimise the negative effect on equality and human rights, and to scrutinise measures taken by the Scottish Government and other public bodies for their impact on equality and human

rights. That inquiry took place between April 2020 and January 2021 and we submitted evidence to it. (NK/36 [INQ000146827], NK/37 [INQ000146885])

92. In August 2021, together with two of our Young Advisers, the Commissioner met with the Parliament's Covid-19 Committee at a Business Planning Day to discuss the ways in which the Committee could ensure that the human rights of children and young people were considered in their scrutiny of legislation.
93. In December 2021, we responded to the Scottish Parliament's Delegated Powers and Law Reform Committee's call for views on the extensive use during the pandemic up to that point of the "made affirmative" procedure. This allows emergency regulations to become law immediately, with MSPs only scrutinising them after the fact. We raised three specific issues in our evidence, which are reflective of our overall concern about the nature and extent of Parliamentary scrutiny during the pandemic. (NK/38 [INQ000146886])
94. Short notice publication and lack of advance scrutiny - too often the text of regulations were published scant hours before they came into force. In at least one case, regulations were not published until after they had commenced. We highlighted concerns around this practice directly to Scottish Government officials, and they were also expressed by others including the Chair of the Independent Advisory Group on Police Use of Temporary Powers Relating to the Coronavirus Crisis. It was not always clear that such short notice publication was necessary, or that it was not possible for parliamentary scrutiny to take place in advance.
95. Absence of Children's Rights Impact Assessments (CRIAs) - the findings of our Independent CRIA demonstrated that the Scottish Government was not consistently fulfilling its obligation to demonstrate to the parliament that it had considered the nature and level of impact on children and young people's human rights.
96. Children and young people's participation – throughout the pandemic we expressed our concern about the limited extent to which children and young people were able to participate in decision-making – not only having their voices heard but taken into account. The Independent CRIA found that this was a major failing of the initial pandemic response from the Scottish Government.

Other key children's rights issues

97. There are a number of key human rights issues that I would like to elaborate on further, as they constituted significant pieces of work for my office, based on our prioritisation model.

School Closures, online education and digital exclusion

98. It is worth noting, because it appears to be much misunderstood, that the Scottish Government never closed Scotland's schools. Ministers had the power to do so, and would almost certainly have been justified in making an order to that effect using the powers in the Coronavirus Act 2020 at the beginning of the pandemic. However, no Education Closure Direction was made, which meant the necessity and proportionality of that decision was not scrutinised by the Scottish Parliament. There is no evidence I am aware of that a CRIA was conducted by central or local government to inform this decision. When, on 20 March 2020, state schools were closed to the majority of pupils, it was Local Authorities that made the decision on the advice of Ministers. As noted previously, my office was not consulted by Scottish Government or by local authorities in advance of this decision being made, or in relation to the decision to close schools again in early 2021.

99. While the approach of allowing local authorities to make the decision was probably a political consideration informed by the sometimes challenging relationship between central and local government on the delivery of the State's duty to secure children's rights to education, it had a number of consequences. Most obviously, there was no derogation of local authority duties to provide education, except insofar as a duty could not be performed as a result of an Education Continuity Direction. The extent to which these duties were fulfilled over the course of the pandemic, particularly as regards disabled children and others with Additional Support Needs (ASN), was a feature of both the Independent CRIA, and our evidence to the Scottish Parliament's Education Committee in June 2020. We also raised in our evidence to the Committee concerns around support for vulnerable children, availability of free school meal alternatives, digital exclusion and exams. In our 23 June 2020 paper for the Scottish Government's Education Recovery Group we set out the framework around human rights to education, we noted our concern that as a result of the pandemic, far more children would need additional support, and that this would be in the context of an education system in which compliance with domestic law rights was poor pre-Covid. The Commissioner also expressed these concerns in a meeting with the Education

Recovery Group on 17 June 2020. (NK/39 [INQ000146851], NK/40 [INQ000613912], NK/40A [INQ000613926])

100. Those concerns appear to have been born out and remained an issue during the second school lockdown; the disruption caused by the pandemic, the lockdowns and restrictions, has fundamentally changed societal expectations about how children and young people can, and should be able to access education. There is an urgent need particularly to recognise the extent to which the education system is not meeting the needs of disabled children and those with other Additional Support Needs. The Scottish Government's Education Reform agenda has stalled, and I am extremely concerned that the pace at which we need to see change is now even more out of sync with the action being taken. On 31 March 2025 I published a report about putting children's rights at the heart of education, which recognised the extent to which children are still experiencing the impacts of the Covid pandemic.

101. These concerns can be exacerbated for children and young people whose rights are most at risk: including children experiencing poverty, young carers, children who have additional support needs, care experienced, LGBTQ+, disabled children and black and minority ethnic children. These are children who are often already experiencing significant disadvantages as a consequence of the how the education system works and responds to need.

The paper for the Education Recovery Group built on earlier statements, for example on 24 April 2020, in which we highlighted again the need to balance rights to health with a recognition that school closures, and covid mitigations, had an impact on children's rights to education, socialisation, play and safety. We also flagged concerns about poverty and digital exclusion, and the risk of long-term impacts on inequality. And in July 2020 we pointed out children were not represented on the Education Recovery Group, and that a lack of data made it impossible to properly assess the impact of school closures on children's rights. (NK/09 [INQ000146832], NK/41 [INQ000146873])

102. We remained concerned about the impact of digital exclusion throughout the lockdowns and periods of remote learning, raising questions with Scottish Government officials to better understand delays in the roll out of digital devices.

103. In April 2020, we flagged to Scottish Government officials the UK Government announcement (which appeared to have been prompted by a letter before action issued by the Good Law Project) on access to online learning for disadvantaged and deprived children. We noted that Scottish Government might be vulnerable to similar action. In May 2020 an announcement was made that £5m was being made available to combat digital exclusion but no mention was made of children. We raised this again with senior government officials. By June 2020 £30m had been committed to combating digital exclusion, while by November 2020 updates from Scottish Government indicated that funding allocations had been made to all Local Authorities, they were responsible for identifying those in need and for securing and distributing hardware and data to meet that identified demand. (NK/41A [INQ000613920] **NK/41B** [INQ000613916])
104. By the end of October 2020, over 32,000 devices (a mix of iPads, Chromebooks and Windows devices) had been distributed to children. Details returned to Scottish Government from Local Authorities at that time showed that in total, c.70,000 devices had been ordered (including the 32,000 already distributed). On connectivity, c.3,000 MiFi units and associated data packages had been distributed alongside devices. In total, c.13,000 units and data packages had been procured by October 2020.
105. However, delivery and roll out continued to be inconsistent, despite reassurances from COSLA and Scottish Government. By early 2022, we were still hearing concerns from children, young people and the adults supporting them, that they were either unable to access devices or support to deal with connectivity issues.
106. While most attention was focused on mainstream state schools, from our pre-pandemic work we were aware of issues for disabled children attending an independent residential special school that Covid had exacerbated. We wrote to the Deputy First Minister on 23 March 2020 to raise concerns that the children in that school had not received individualised assessments of their needs and were at grave risk of missing out on essential supports and their rights to education. This was despite the Covid closures representing the second time in fifteen months that the children had experienced their school being closed. One of the contributing factors was a failure to consistently recognise residential special schools as children's homes, particularly for those with year-round placements. This meant that they were not exempt from closures in the way that children's care homes were. We received a response on 29 April 2020. (NK/42 [INQ000146821], NK/42A [INQ000613915])

107. Giving evidence to the Scottish Parliament's Education, Children and Young People Committee on 17 November 2021, the Commissioner paid tribute to the exceptional work of so many teachers and referred to the need to learn lessons from the experience of children with Additional Support Needs (ASN); to seize an opportunity to change practice and better support disabled children in education. It is disappointing that this opportunity has been lost as a result of concentration on a "return to normal". (NK/43 [INQ000146877])

108. In fact, based on my own experiences since taking office in 2023, I would argue with deep regret that not only have the lessons of the pandemic not been learned, but responses within the education system have focused on the symptoms children present with, rather than addressing the root causes. For example the current Scottish Government focus on attendance and "behaviour" fails to take a rights-based approach, does not sufficiently acknowledge the roots of both these issues in the pandemic and risks displacing responsibility for educational failures from the State onto children and families. Ministers seem too often to be seeking simplistic responses to complex issues, while children continue to be largely excluded from Scottish education discourse and decision making.

Child protection and safeguarding

109. We were not consulted on this issue ahead of lockdown and school closures being announced. When it was, we expressed concern that the measures put in place to identify and support vulnerable children through hubs had not been well taken up and the impacts of that missing support might take some time to fully emerge. There was significant variation between local authorities in the interpretation of criteria to attend hubs, which we engaged with Scottish Government to attempt to clarify. For example, we were able to secure clarification that children experiencing domestic abuse were eligible for a place in a hub. In relation to domestic abuse, we also used our early contact with Scottish Government and Police Scotland, to reinforce concerns that lower levels of reports to police would not reflect the reality of children's experience. Most children were having significantly reduced or no levels of contact with the professionals who might be expected to make child concern reports.

110. It was not clear that all hubs had the ability to adequately support disabled children and we heard from parents who had not taken up places as a result. This was

particularly an issue for children who normally attended mainstream schools but needed additional support to do so. Although there were some examples of specialist hub provision in some local authorities and the use of child minders to support disabled children and their families, this was inconsistent and in many areas inadequate. Legitimate concerns about potential exposure to Covid resulted in some parents not taking up places, particularly if their child or another family member were at high risk from Covid infection. Together with the withdrawal of respite care, this significantly increased burden and stress for disabled children and their families, including siblings who acted as young carers.

111. We warned of an increase in the number of children needing mental health support, (including disabled children and those with other additional support needs, young children, children due to be making school transitions this year, children affected by domestic abuse, those affected by substance abuse, those who parents have mental ill-health). (NK/43 [INQ000146877])

Covid mitigations in schools

112. One of the most controversial areas during the pandemic was the issue of Covid mitigations in schools once they had returned. On 2 July 2021, we wrote to the Minister for Children and Young People to ask the Scottish Government to consider its approach towards restrictions before schools returned in August. We were pleased that the Government responded by outlining a more targeted and limited approach to self-isolation in schools than had originally been suggested. (NK/44 [INQ000146872])
113. However in a subsequent statement, as schools prepared to reopen, we noted that we remained concerned that there were significant inconsistencies in the loosening of restrictions for adults compared to children. Adults could go to the pub, or out clubbing without a mask, yet young people had to sit in lessons in school all day wearing a face covering. We pointed out that masks impact on young people's learning and their time in school. They make socialising, communicating and accessing support harder. The Commissioner wrote an article for the Scottish Sun, also published as a blog, in which he expressed concerns about the impact on clinically vulnerable children, saying "...We must not have a situation where some children are forced into 'shielding by default' as restrictions ease". (NK/41 [INQ000146873], NK/45 [INQ000146920])

114. While we accepted that mitigations, including face coverings, could be an important way to ensure all children and adults could safely attend school, we warned that the use of face coverings must be proportionate and should be kept under regular review as vaccination became available to children and young people. We called for separate consideration of the proportionality of facemasks in classrooms, calling on the Scottish Government to remove this restriction as early as possible. We also called for the reasoning behind mitigation decisions to be shared with young people.
115. As part of the World Health Organization's Technical Advisory Group on schooling during Covid-19 (discussed in more detail later), we called for further evidence to ascertain the optimum set of mitigation strategies, including vaccination of children, that would achieve the full range of health, social and educational aspirations for the entire population, particularly children.

Free School Meal Alternatives

116. One of the issues we highlighted early in the pandemic was the need to ensure that alternatives were provided for children who would normally receive a free school meal. This recognised the additional financial stress for families caused by the pandemic as well as the benefit that free school meals bring to children living in poverty. Although local authorities generally acted quickly to put in place alternative arrangements within the first week of school closures, approaches varied across local authorities. Staff carried out an analysis of provision early in the pandemic to better understand what was being provided. We opted to do this using publicly available information via Council websites, as we were mindful of the pressure local authority staff were under at that time. (NK/46 [INQ000146828])
117. In the early stages meal packs were a common response. In some local authorities a week's food was provided at one time, however we were aware of local authorities where families had to collect meals on a daily basis, in some cases not even from their local school. We were concerned that this represented a barrier and contradicted the public health messaging to stay home. For example, in Argyll and Bute, a large rural and island authority, meals had to be collected on a daily basis from only 10 of its 89 schools. By contrast, some local authorities (Clackmannanshire, Inverclyde) arranged for meals to be delivered to families' homes. Over time, local authorities moved to

vouchers or direct payments for most children, but practice varied. The amount per child per week varied from £10 (Glasgow) to £20 (East Dunbartonshire, North Lanarkshire) with most in the range of £10-13). In Glasgow, initial vouchers were valid only at Farmfoods supermarkets and we were concerned that for many families it would be difficult to access one of their stores.

118. The Scottish Government's initial response was that local authorities had flexibility to provide free school meals alternatives. Whilst we accepted the need in the initial stages of lockdown, we began to challenge this from mid-April 2020 and advocated for a nationally consistent cash first approach with a payment of £20 per week per child. We highlighted that this would enable children and their families to access food that was convenient and appropriate to them with dignity and flexibility and took account of the additional costs of preparing food. On 21 April 2020, Scottish Government officials confirmed to us that 10 local authorities were providing food vouchers, 12 were providing direct financial payments, 13 were delivering food parcels and 11 were making food available for collection (note, some local authorities provided more than one option for families).

119. We continued to advocate for a cash first approach throughout both periods of school closure and for ongoing support during school holidays and although the number of local authorities offering cash alternatives increased, this was not taken up by all local authorities and the Scottish Government left this at their discretion. We believe that the Scottish Government could and should have imposed this approach to ensure consistency. This is in line with a human rights approach to social welfare compatible with Article 27 of the UNCRC and Article 9 of ICESCR. (NK/47 [INQ000146845])

120. We note that Scotland never had a national voucher scheme, as was the case in England, and our view was that such a scheme would have disadvantaged families in rural, island and the most deprived communities, many of whom lack access to a major supermarket chain.

Exams and the Alternative Certification Model

121. Article 12 of the UNCRC provides that children have the right to express their views freely in all matters affecting them, and to have those views given due weight in accordance with their age and maturity. The UN Committee on the Rights of the Child

has made clear, including in its General Comment No. 12, that “all matters affecting the child” must be understood broadly. We should have no patience for the notion that children’s participation rights are restricted to a narrow range of issues. Children and young people are members of society, and we should ensure we offer them every opportunity to take part as full and valued members.

122. It is hard to imagine a policy area that more clearly and obviously engages children’s rights than education. However, one of the impacts of the pandemic was to exacerbate existing issues within the Scottish education system, particularly the extent to which decisions tend to be made about, rather than with, children and young people. As we note above, this shows little sign of changing.

123. One of the most striking examples of children’s rights being side-lined was the exams debacle. As we noted in our submission to the Priestley Review; “Many of the negative impacts relating to the cancellation of the 2020 exam diet are the result of a failure to recognise young people as rights holders and as the key stakeholders of the Scottish education system.” This is sadly indicative of where children and young people sat, and continue to sit, in Scottish education’s hierarchy of interests. Decisions made about exams and assessments during the pandemic created huge amounts of unnecessary stress and anxiety for children and young people, who were absent from the decision-making process. (NK/48 [INQ000146862])

124. The announcement that exams would be cancelled was made on 19 March 2020. The office was not consulted on this decision or on the Alternative Certification Model. Initially, it was announced that although the exam diet was to be cancelled, young people sitting national assessments would be able to attend school during the week commencing 23 March 2020 to complete course work. This decision was reversed over the course of the weekend of 21-22 March 2020. Staff access to schools, and therefore coursework, was then curtailed by the announcement of the national lockdown on the evening of 23 March 2020. The detail on the Alternative Certification Model (ACM) that subsequently emerged notably did not include detail on the process by which teacher estimated grades would be moderated. There was also initial confusion as to whether children would have the opportunity to complete examinable work in the early lockdown period.

125. We were immediately concerned that the SQA had not published any Equalities or Children's Rights Impact Assessments, and in particular had not explained how it intended to ensure that the potential negative impacts of the Alternative Certification Model on children whose rights were most at risk were mitigated. We heard from young people, including our Young Advisers, that this lack of communication was causing stress and anxiety. We noted some of these concerns in our evidence to the Scottish Parliament's Education Committee in June 2020. (NK/49 [INQ000146847])
126. We wrote to the SQA's Chief Executive in April, and again in July expressing our concerns about the potential for the ACM to adversely impact children's rights and seeking assurance on mitigations. We received responses to both letters which were unsatisfactory. In June, we also highlighted our concerns in evidence to the Scottish Parliament's Education and Skills Committee. (NK/50 [INQ000146825], NK/51 [INQ000146854], NK/50A [INQ000613913], NK/51A [INQ000613918])
127. We initially sought to support SQA through a meeting with our Young Advisers on 13 July 2020. Our Young Advisers Group also conducted a rapid Children's Rights Impact Assessment (CRIA) which was provided to SQA. While engagement at this level was positive, it was not reflected in SQA's subsequent decision-making or organisational response to the wider human rights concerns. (NK/51B [INQ000146853], NK/52 [INQ000146896])
128. The concerns we and others had expressed were borne out when results were published on 4 August 2020, alongside the details/methodology of the Alternative Certification Model. SQA had applied a moderating algorithm to the teacher-assessed grades, based on the historic performance of schools.
129. That meant that children from historically poorer performing schools (often from more deprived parts of Scotland) were more likely to have their results downgraded than those from higher performing (often private) schools. As we put it in a series of tweets on results day "We recognise grade estimates needed moderation, but are disappointed that SQA's process treats children as points on a bell curve instead of individuals". We elaborated on the point in subsequent statements: "This situation has placed process before people, and in endeavouring to protect the system has delivered results to individual students that are simply unfair." (NK/53 [INQ000146857])

130. It was extraordinary that neither SQA or Scottish government had apparently noticed the problem with the algorithm until it was pointed out, and even then Ministers took some time to accept that young people simply and reasonably wanted their grade to be based on a fair assessment of their own ability, not on the historic performance of the school they happened to attend. SQA to my knowledge has never accepted that the 2020 ACM was a mistake or that it resulted in manifest unfairness. SQA also failed to learn the lessons of 2020 in subsequent years, with the result that the organisation is set to be disbanded and replaced. One of the biggest challenges of this process will be how to ensure SQA's organisational culture is not carried over into the new organisation.
131. There were clearly procedural weaknesses that contributed to the disaster, for example there is evidence that the EQIA and CRIA were done at the last minute – they were not considered by the SQA Board until 30 July 2020– rather than informing and assisting the decision-making process. To our surprise SQA's CRIA also identified fewer UNCRC rights engaged than the rapid assessment carried out by our Young Advisers Group.
132. Young people were not involved at all in the decisions about the ACM; so perhaps it was unsurprising that the model and particularly the application of an algorithm based on historic results so plainly ignored their interests. SQA also refused to discuss its methodology or publish it in advance, meaning that discussions that could and should have taken place months prior to results day had to happen post hoc and in a way that created significant unnecessary anxiety and distress for young people.
133. Having been denied a seat at the table where the key decisions were made, it was right that young people took the lead in protesting the unfair outcome of those decisions. My office sought to support them and amplify their voices wherever possible. We made a number of strong public statements on results day and in the immediate aftermath, including writing to the Deputy First Minister and to SQA calling for immediate reparative action and an apology. We received a response from the Deputy First Minister on 28 August 2020 confirming the decision to revert to teacher-assessed grades. (NK/54 [INQ000146855], NK/55 [INQ000146856], NK55A [INQ000613927])

134. We supported the “SQA Where’s Our Say” group to hold a virtual meeting with young people on 10 August 2020 in which they were able to express their concerns. We also discussed the 7 August young people-led George Square protest in advance with Police Scotland in order to ensure that a human rights-based approach to policing was taken and that children’s rights to peaceful protest were respected. To the great credit of the young people involved, the protest passed off smoothly and was a powerful articulation of the anger and frustration felt as a consequence not just of SQA’s decision-making, but also the defensive reaction from ministers.
135. While young people did eventually receive an apology from the First Minister on 9 August, 2020 along with the decision to abandon the algorithm and revert to teacher estimated grades, we were forced to write again to the Deputy First Minister on 17 August 2020 after his comments in a BBC interview shortly afterwards undermined the sincerity of that apology. We pointed out that the decision to revert to teacher estimated grades was not an act of good will or charity from the government to make up for a difficult year; it was remedying a systemic injustice that should never have happened. Young people “felt” the moderation process was unfair because it *“was”* unfair. It was based on an algorithm that embedded bias into the process, while superficially and falsely reassuring decision makers that bias was impossible. This was overlooked because ministers and the SQA were focused on what they referred to as the “integrity” of the system, and at system level results looked fair – even progressive – compared with previous years. But they camouflaged significant unfairness for individuals, especially those from more deprived areas. (NK/56 [INQ000146859])
136. As I note above, SQA has never acknowledged that the 2020 ACM caused systemic unfairness and, partly as a consequence, some of the same mistakes were repeated in 2021 and 2022. It is my view that structural weaknesses in government including siloed working, and gaps in subject specific knowledge/expertise mean that Ministers and civil servants do not sufficiently constructively challenge Non-Departmental Public Bodies (NDPBs) in situations like this, relying instead on them to provide briefings and fill in for gaps in expertise. SQA’s narrow focus on the “integrity” of the system – defined in practice as little more than the extent to which results compared to previous years – blinded it to the fact that a system which does not deliver fairness to individuals has no integrity. Ministers and government officials should have corrected for these institutional blinkers but did not do so.

137. We saw the impact of this over-reliance again in February 2021 when in a letter to the Scottish Parliament, the DFM said that our office was “working closely” with SQA. In fact, other than the Young Advisers Group meeting in July 2020, the office only had one meeting with SQA officials, in January 2021, which left us with the strong and enduring impression that they did not understand or prioritise children’s human rights. No further meetings took place and it would be wholly misleading to say we were ever working with them, let alone “working closely”.
138. For most of the media and political establishment, the decision by the DFM to revert to teacher estimated grades resolved the issue. Politics and the news cycle moved on. However, my office continued to advocate for a small group of young people, some of whom contacted us to say that they disagreed with their teacher’s estimate and had been left with no route for redress.
139. In a letter to the Deputy First Minister on 17 August 2020, we flagged the need for the Scottish Government to “provide a route for appeal which is directly accessible to young people who disagree with their teacher’s estimate, or who have been subject to discrimination, unequal or unfair treatment.” We subsequently worked with the SQA Where’s Our Say group to make a detailed suggestion for two additional appeal grounds that would balance the need for a speedy and certain process with a rights-respecting model. This was sent to the Scottish Government on 2 September 2020 and reiterated a number of times subsequently. No meaningful response was ever received. (NK/56 [INQ000146859], NK/57 [INQ000146861], NK/58 [INQ000146866])
140. It took until 8 September 2021 for the Cabinet Secretary for Education to make a final decision not to offer any route of redress to this group of young people. She concluded that “there was no way to reopen, or widen out grounds for appeal for, the 2020 appeals process in a fair and equitable manner to all learners.” We called on several occasions for that decision to be explained. None has ever been forthcoming, leaving the young people concerned in the dark as to why the government was unwilling to consider a minor amendment to the routes of appeal. (NK/59 [INQ000146878])
141. In discussions with officials, the only concrete suggestion that was ever offered was that there was no money available to expand the scope of appeals. This was in January 2021, five months after the issue was first raised, and shortly after SQA was reported to

have returned some £14.3m of its budget unspent to the Scottish Government. Had a timely decision been made, more than enough money would have been available to ensure fairness for all. In my view, this is another example of government prioritising the interests and views of the public bodies who operate the system at the expense of the children who experience it.

142. As noted previously, lessons were not fully learned and the scope of appeal grounds was again an issue in 2021. On 8 December 2021 we wrote to the Cabinet Secretary for Education to raise concerns about the appeal grounds for the 2021 ACM. Most significantly, we had noted that for 2021 SQA provided that an appeal could be made on grounds of discrimination where there had been a breach of the Equality Act 2010 or the school, college or training provider failed to provide agreed Assessment Arrangements. We pointed out the various issues with that provision, including that the school/college has to acknowledge that it breached the Equality Act 2010, or the young person must have been able to raise a complaint or legal action and take it to a successful conclusion before the appeal deadline. The former was unlikely given the potential consequences for the school, the latter was impossible in the timescale allowed and involved a significant financial barrier which disproportionately disadvantaged children and young people from more deprived backgrounds. No change was made. (NK/59 [INQ000146878])

The Care system, and children in contact or conflict with the law

143. Scotland's Independent Care Review ran from February 2018 to February 2020 when it published a suite of reports. My predecessor co-chaired the Rights Working Group within the Review. The Inquiry may be particularly interested in two of the reports. The Promise report sets out the views of over 5,500 care experienced children and adults, families, volunteers and professionals about the state of the care system. The Rules report sets out the legislative framework which governs the system. The Independent Care Review represents the most comprehensive assessment of the state of Scotland's care system before the pandemic of which we are aware. (NK/59A [INQ000551170], NK/59B [INQ000613928])
144. The office undertook some targeted work relating to aspects of the care system over the course of the pandemic based on the prioritisation approaches I have outlined

above; these related principally to the children's hearings system, contact, and children deprived of their liberty. They are covered elsewhere in this statement.

145. As noted previously, one of the concerns we had in relation to the Scottish Covid legislation was the extent to which emergency legislation restricted rights within legal processes including the children's hearings system. We absolutely recognise the challenges of delivering hearings in the context of a global pandemic, especially in the first few weeks. However, the pandemic did provide evidence that in some respects the paternalistic roots of the system run deep, with a focus on what adults think is best for children. Under pressure it was too easy to revert away from the rights-based, participatory approach which has developed during the last twenty or so years.

146. As noted previously, this was one area where my office was proactively consulted and engaged in detailed discussion with Scottish Government officials and public bodies during the preparation of the emergency legislation. We expressed concern that not all of the measures could be justified as necessary and proportionate interferences with rights. Subsequently, concerns about the practical operation of the system were raised with my office by solicitors and by NGOs. We produced a paper for the Scottish Government in May 2020, which we broke those concerns down into three broad areas (NK/60 [INQ000146838]):

- Participation rights (Article 12 UNCRC), including the challenges inherent in remote hearings.
- Rights to respect for family life (Art 8 ECHR and Article 16 UNCRC), including rights to contact and the need to respect decisions made by courts and tribunals.
- Fair process (Article 6 ECHR), including access to papers, and balancing rights to protections with rights to participation and a fair hearing.

147. That was followed up with a meeting between government officials and representatives of the Scottish Children's Reporter Administration (SCRA) and Children's Hearings Scotland (CHS). The government responded formally to these concerns in June 2020 and we did see a reduction in issues being raised with us following this meeting. (NK/61 [INQ000146849])

148. Our concerns about contact however, persisted into the summer. In July 2020 we highlighted to Social Work Scotland, who were developing a Framework for contact, that many looked after children had not been offered any direct contact with family for a

very considerable period of time. The principal issue here was in my view a failure to consider cases at an individual level with Scottish Government failing to set a presumption that children had the right to legal orders being respected. While it was of course possible to rebut that presumption in individual cases based on risk assessments and the best interests of the child, a blanket approach, resulting in limited contact for all children in care, risked depriving children of their Article 8 ECHR rights in situations where the interference could not be shown to be necessary or proportionate. This was in sharp contrast with the situation with children subject to private law contact orders. Regulations permitted children living with separated parents to continue to move between households and clear guidance was issued by the Lord President of the Court of Session on the need to respect contact orders in the first week of lockdown. (NK/62 [INQ000146850])

Children deprived of their liberty

149. As the impact of the pandemic became clear, international experts, including the then 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.

150. 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. These children's rights were largely forgotten during the pandemic.

151. For example, children and every detainee (of any age) detained on remand were excluded from the eligibility criteria under the Release of Prisoners (Coronavirus) (Scotland) Regulations 2020.

152. The office called on the Scottish Government to follow the UN Committee's 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, no child, or remand prisoner was released early in Scotland. As I note previously in this statement, the office attempted unsuccessfully to discuss these matters with officials before the Regulations were laid and came into force. (NK/63 [INQ000146841])

153. We reiterated our concerns on World Children's Day (20 November 2020), in a blog with the then Director of the Children and Young People's Centre for Justice, Claire Lightowler, and in an article for the Scottish Journal of Residential Childcare. The Commissioner 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. (NK/64 [INQ000146931])

154. On 15 September 2021 the Commissioner participated in the Scottish Parliament Criminal Justice Committee's roundtable discussion on prisons and prison policy. He followed up with a letter in which he raised a number of serious concerns about the rights of children deprived of their liberty, including the impact of Covid-19 on conditions of detention. I agree with his view that those conditions risked breaching the UN Convention on the Rights of the Child (UNCRC), as well as the European Convention on Human Rights (ECHR), and the UN Convention Against Torture (UNCAT). (NK/65, [INQ000613909])

155. He noted that children in detention were still being subjected to a restricted regime under the Prisons and Young Offenders' Institutions (Scotland) Amendment Rules 2020 (the 2020 Rules), which were passed in response to COVID-19, and remained in force. Our understanding is that there was no public consultation by the Scottish Government on whether these provisions should be extended. Rather SPS itself undertook a limited consultation over the summer with selected bodies. The office received notification of this consultation but with a short timeframe that limited our ability to consult children and young people or respond in detail.

156. At the end of 2021, Her Majesty's Inspector of Prisons Scotland (HMIPS) submitted a report to the Scottish Government setting out proposals for 16/17 year olds to be removed from prison. Concerningly, Ministers chose not to take those proposals forward, maintaining a timetable to end detention of children in Polmont by 2024. This

delay was frustrating, as concerns about the circumstances faced by children in detention were ongoing.

157. The office contributed to the HMIPS Year of Childhood pre-inspection health and wellbeing survey, which was published on 28 October 2021. It found that there were ongoing concerns about children's limited access to mental health and other therapeutic supports; children spending 23 hours a day in their cells; routine strip-searching; authorisation of pain-inducing restraint; lack of purposeful activities including access to work, leisure, libraries and education; lack of family contact; and lack of access to telephones. In human rights terms, this potentially constitutes a breach of children's right to protection against inhuman or degrading treatment or punishment in line with Article 3 of the ECHR and Article 37 of the UNCRC. (NK/66 [INQ000146888], NK/67 [INQ000146889])

158. The office contributed to a Scottish Government Short Life Working Group (SLWG) on under-18s in Polmont in early 2022. A draft report was produced by this group and circulated to the Scottish Government's Collective Leadership Group on 3 March 2022, who requested the SLWG action. We strongly recommended that, in addition to the action proposed under the Children's Care and Justice Bill, Coronavirus Emergency Legislation could have been used to take more immediate action to remove under-18s from YOIs and place them in secure care provision. (NK/68 [INQ000146880])

159. My office did not consider the recommendations in the SLWG report reflected the urgency of the changes required and did not agree that working to 2024 was sufficient. In the event, the legislation preventing children from being sent to prison was finally implemented at the end of August 2024, three months after another child took his own life while detained in Polmont YOI.

Policing the pandemic

160. Some of our Young Advisers Group worked with Police Scotland during the first lockdown to inform, educate, and ultimately influence the way the force engaged with young people. They had been alarmed at social media reports of heavy-handed policing, mainly from English forces, and wanted to positively impact Police Scotland's approach. The group had a series of meetings with Police Scotland and explained why adolescents found restrictions particularly challenging, how they affected children from poorer backgrounds or with disabilities disproportionately, and how the force should

approach and engage with young people from a position of empathy and understanding. (NK/69 [INQ000146831], NK/70 [INQ000146834])

161. Part of the context for this work was an open acknowledgement on both sides that the rapidly changing legal position, unhelpful conflation of law and guidance, and confusion about differential approaches in England and Scotland risked confusing both young people and police officers.

162. This work had an immediate impact, as Police Scotland very quickly produced training and guidance for officers which was a direct result of listening to the Young Advisers Group, and which built on the force's "four E's" approach to policing the pandemic. They very helpfully prepared a version of the training material which highlighted the areas influenced by the Young Advisers. (NK/71 [INQ000146840])

163. The positive relationships and trust we were able to foster assisted in securing a commitment that the daily data provided to Operation Talla leaders would include disaggregated data on children and young people, including the separation out of 16/17 year olds use of enforcement powers. That then led to the legislative amendment on Fixed Penalty Notices (referred to elsewhere in this statement.

Police Independent Advisory Group

164. One of the few exceptions that we made to the office being involved in working groups was the decision to contribute to two Scottish Police Authority (SPA) Independent Advisory Groups, chaired by John Scott QC (as he was at the time).

165. The Independent Advisory Group on Police Scotland's Use of Temporary Powers relating to the Coronavirus Crisis (IAG) was established soon after the 20 March 2020 lockdown, and the publication of the Coronavirus Act 2020 and subsequent Scottish provisions. The second group evolved out of the first and was established specifically in preparation for the COP26 Climate Conference to be held in Glasgow, in November 2021.

166. The decision to engage on the IAG was based on the extent to which we anticipated the emergency legislation and policies, and Police Scotland's practices would potentially impact (positively or negatively) on the rights of children and young people throughout the pandemic. We had formed a view based on our experience of

engaging with Police Scotland that they would welcome constructive challenge. Our involvement was focused on ensuring that the group had a full understanding of the human rights issues at play for children and young people. We also took account of the fact that this was a group intended to play a scrutiny rather than a delivery role, and that it benefited from an independent Chair.

167. The time commitment was significant; the Group originally met twice per week and then once a week for the next two years.

168. We produced two formal reports for the group. In the first, we outlined the international and domestic human rights, legal and policy frameworks which underpin Scotland's care and justice systems for children, young people, and families. The second report highlighted five areas of policy/legislation which generated particular concern about the pandemic and the State response to it, having exacerbated existing inequalities. These covered children and young people who:

- were already in conflict with the law or deprived of their liberty
- were living in poverty
- were care experienced, vulnerable or at risk of abuse or exploitation
- had mental health needs or other disabilities; or
- were exercising their rights of association and peaceful assembly

169. The purpose of the reports was to ensure the Group was fully aware of the potential impact on children's human rights of law, policy and practice. They also served to ensure the Group's work was informed by an international perspective. (NK/72 [INQ000146846], NK/73 [INQ000146874])

170. As the Group developed, it took an interest in wider rights issues, and my office provided an update each week on new or emerging concerns. For example, discussion on policing of the young people-led protests against SQA (covered elsewhere in my statement) led to useful work not just on that specific protest, but on rights to protest more broadly. This work then fed into the preparation for COP26, with my office producing a leaflet on children's rights to protest. My office was also represented on an IAG dedicated to policing at COP26, which was also impacted by the pandemic, including by the early stages of the Omicron variant outbreak in November 2021. (NK/74 [INQ000146900])

171. The IAG benefited from regular presentations from external experts on health, justice, education, disabilities, human rights law and behavioural science. These informed our own work as well as that of the IAG. The IAG also allowed us an additional route to disseminate our views and concerns via webinars and wider meetings, for instance with the SPA Board.
172. Alongside other regular routes of contact with Police Scotland, the IAG assisted in gaining the support of Police Scotland for the amendment to Regulations that prevented 16/17 year olds being subject to Fixed Penalty Notices (referred to elsewhere in my statement). However, our calls for Police Scotland and COPFS to review those cases where under 18s had already been fined were not heeded.
173. Similarly, it became clear through IAG discussions that there were both data gaps in terms of what Police Scotland was able to report on, and privacy concerns about use of the Vulnerable Persons Database. The office continues to highlight our concerns about this.

A Place in Childhood research

174. We built on the independent CRIA by conducting a long-term piece of work with A Place in Childhood (APiC). They had conducted work immediately after the first lockdown in which they set out to explore changes and challenges children and young people in Scotland had experienced. We supported them to continue their work with 25 Young Consultants, who were able to explore their experiences of the second lockdown. The 25 young people they worked with were aged between 11 and 17, and from Glasgow, Aberdeen, Edinburgh, rural Falkirk and rural Stirlingshire. Their work reflected on their return to school in autumn 2020 and explored their experiences throughout the second lockdown. They created a series of “asks” for the Scottish Government on a wide range of issues including education, inequality and wellbeing. For example, they called on the Scottish Government, local authorities and schools to (NK/75 [INQ000146897]):
- redesign assessments,
 - recognise that teachers have struggled in the pandemic and that they need to be supported too,
 - ensure that workloads in school are not overwhelming, and
 - create school-based discussion groups that could feed into Government plans, so that children and young people can be a key part of ongoing improvements.

175. The young consultants were clear that it was important that this work needed to develop and include the experiences of a broader range of children and young people.

176. With our support, APiC then held workshops with the following groups:

- Children with Long Covid
- Young carers (from urban and rural areas)
- Refugee and asylum-seeking children
- Children of families affected by imprisonment
- Primary-aged children
- Unfortunately, a specific session to hear exclusively from Black and People of Colour young people was not able to go ahead.

177. This work provides an excellent example of the extent to which children and young people can contribute to discussions on policy and offer constructive and realistic solutions to challenging problems if adults only make the time and space to listen to them. This ought to be one of the key lessons Scotland learns from the pandemic, and I would join my predecessor in commending the young people's "asks" to the inquiry. A wide range of specific content was produced setting out and highlighting the experiences of children living with Long Covid. (NK/75A [INQ000552979], NK/75B [INQ000552971])

Online Harms

178. The Commissioner holds no specific statutory role in relation to children's access to online technologies. Most policy areas relevant to online harms are reserved to the UK Parliament, with which the Commissioner has more limited interaction. The office of the Children's Commissioner for England has undertaken research in relation to online harms, which we have also sought to learn from, and which may be relevant to the Inquiry. (NK/75C [INQ000613925])

179. Our office has undertaken a small number of pieces of work and meetings that may be relevant to the Inquiry's areas of interest in relation to online harms. In July 2020, our Independent CRIA on the Response to Covid-19 in Scotland, referred to elsewhere in the statement, highlights that children coming out of lockdown may potentially be at increased risk of harm as a result of using more digital services. We made this

observation in the context of recommendations to Scottish Government on ensuring child protection services remain functioning and available during lockdowns.

180. In February 2022, as part of Safer Internet Day, the office published a blog sharing our priorities for strengthening the draft Online Safety Bill. Our priorities included making what constitutes harm clear and well understood; urgent improvements on age verification and age assurance; involvement of children and young people in designing the processes intended to protect them; and that children should have the right to complain to Ofcom, not just directly to platforms. (NK/75D [INQ000613921])

181. On the 20th January 2022, a staff member from the office participated alongside representatives from other children's sector organisations in an online workshop hosted by Scottish Government, to discuss where we thought legislation could go further to protect children online. On 8th February 2022, the Commissioner met with the Scottish Government's Minister for Children and Young People to discuss the Scottish Government's approach to the Online Harms Bill. An internal agenda and briefing note, including a record of the key points raised by the Commissioner during that meeting (and the earlier workshop) is included. This note also reflect the points we made at the 20th January meeting. The office did not engage in the technical detail of the bill, the focus remained on broad principles. (NK/75E, [INQ000613922])

182. Our office gave evidence to the Scottish Parliament's Criminal Justice Committee on tackling child abuse, grooming and exploitation on 18th May 2022. The issues we highlighted included concern over the increase in tech-enabled forms of child sexual abuse; the need for sensitive and inclusive approaches to raising awareness with children and young people; and the need for digital service providers to be held accountable and liable for the welfare of children using their services. (NK/75F [INQ000613923])

183. Our office responded to a consultation from Ofcom on their draft Codes of Practice for internet service providers in relation to protecting children from harm, required by the Online Safety Act 2023. In our response, we highlighted the importance of child-friendly and accessible complaints mechanisms and shared concerns children have expressed in relation to existing systems provided by internet service providers. We also highlighted the importance of children actively participating in developing the complaints and user-reporting processes. (NK/75G [INQ000613924])

International work

184. A key part of the office's role is to provide a link between children and young people in Scotland, and international human rights frameworks. We often do this via collaborative networks with fellow Commissioners and Ombudspersons in the UK and Europe.

European Network of Ombudspersons for Children (ENOC)

185. As a member of the European Network of Ombudspersons for Children (ENOC) we worked closely with our 44 sister organisations across Europe. As chair-elect from September 2019, the Commissioner was a member of the Bureau throughout the period, becoming Chair in October 2020.

186. He co-authored the ENOC Bureau statement of 1 April 2020 on "children's rights in the context of the COVID-19 outbreak" which set out the rights framework and called upon our governments, the European Commission and the Council of Europe to undertake all appropriate actions to ensure that the rights of all children, as guaranteed by the UN Convention on the Rights of the Child (1989) and the General Comments of the UN Committee on the Rights of the Child, are respected during the COVID-19 healthcare crisis.(NK/76 [INQ000146824])

187. The statement focused on the issues of:

- Information and participation (Arts 12 and 13 UNCRC)
- Protection from violence and abuse (Arts 19 and 34 UNCRC)
- Rights to health and development, to benefit from social security, and an adequate standard of living (Arts 24, 26, and 27 UNCRC)
- Education (Arts 28 and 29 UNCRC)

On 2 June 2020 the Commissioner participated in an online session with ENOC and UNICEF colleagues looking at lessons learned by children's commissioners and ombudspersons across Europe. The session highlighted a number of human rights issues common to many of jurisdictions, including:(NK/77 [INQ000146844])

- Digital poverty and digital exclusion, particularly for children whose rights were already most at risk.
- Increased risk of exposure to domestic abuse.

- Increased risk of cyber bullying.
- Escalated concerns for disabled children.
- Increased risk mental health issues due to isolation, sometimes in an unsafe environment.
- Limited access to healthcare and reluctance of parents to bring children to hospitals.
- Concerns for children in care, including limited contact with biological parents
Exacerbated impacts of poverty.
- Limited or no time for outside play and interaction with other children
- Extreme vulnerability of asylum seeker and refugee children especially when placed in inappropriate conditions.

188. From October 2020 when the Commissioner became the Chair of ENOC, the priority focus of its annual workplan was “COVID-19: Learning for the future”. As part of that work, ENOC has focused on assessing the impact of states’ responses to COVID-19 on children’s rights in Europe.

189. A special Working Group, chaired by the Office of the Deputy Ombudsman for Children Greece, led the work on the priority theme supported by Simon Hoffman and Rhian Croke, independent expert advisors. The working group launched a questionnaire to map the situation regarding COVID-19 and children's rights within the membership and collected feedback from 32 ENOC members from across Europe. Members' contributions have been collated and analysed in a Synthesis Report. Based on the findings of the Synthesis Report, ENOC organised the first round of discussion on the issue of "COVID-19: learning for the future" on the occasion of a working seminar online on 1 June 2021, aiming at informing the preliminary terms of the ENOC Position Statement on the same theme.(NK/78 [INQ000146875], NK/79 [INQ000146876])

190. In parallel and within the framework of the ENYA (European Network of Young Advisors) child participation project, children and young people from across Europe expressed views on what aspects of their lives have been impacted by laws and policies put in place by governments to tackle the pandemic, and what mitigating measures and solutions can be found. Young people from 17 countries/regions participated in an ENYA online Forum “Let’s talk young, Let’s talk about the impact of COVID-19 on children's rights!” on 1-2 July 2021 to work on common and specific recommendations, to be included in ENOC's Position Statement.

191. ENOC developed a new partnership with UNICEF to support ICRIIs conduct impact assessments on covid related measures. This was based on the work we had conducted in Scotland on the independent CRIA. The objectives included building the capacity of Ombudspersons for Children's offices to advocate for the use of CRIAs by government and state agencies; to build the capacity of Ombudspersons for Children's offices to undertake independent CRIAs themselves.

192. The report concludes that the successful implementation of a CRIA as a tool to promote children's rights depends on the existing level of child rights awareness, as well as access to information and the quality of data concerning children and their rights. The CRIA methodology is likely to work best when applied in a context where CRIAs are a well-understood and established practice and where the understanding of child-rights based approaches is sufficiently robust. The findings reflect those of our independent CRIA in suggesting that governments should conduct CRIAs before adopting measures that impact children, and that national and local decision-making processes should be designed in such a way as to include children. (NK/80 [INQ000146881])

193. This engagement with colleagues at European level was both an invaluable source of support, and an opportunity to learn from the experiences of other European nations, some of whom had different approaches to managing and responding to the pandemic. For example, on 17 September 2020 and 19 May 2021 the Commissioner gave evidence to the Council of Europe Committee on the Rights of the Child (CDENF) on the work of ENOC during the pandemic. The office also shared good practice on the use of CRIA with officials who were conducting a review of the Scottish Government's Child Rights and Wellbeing Impact Assessment (CRWIA) model in March 2021.

British and Irish Network of Ombudspersons and Children's Commissioner (BINOCC)

194. This smaller network consists of the Children's Commissioners for England, Scotland, Northern Ireland, Wales, the Ombudsperson for Children from Ireland, and more recently the Children's Commissioner for Jersey.

195. The offices and Commissioners were in regular contact, particularly with the Commissioners for the devolved UK jurisdictions, to share the experiences in our

countries. This took place at Commissioner and staff level, especially on issues that were common across jurisdictions. At the start of the pandemic, we were all expressing similar concerns (poverty, child protection, education (particularly disabled children), and health (particularly mental health). We were able to share examples of good or innovative practice in other jurisdictions and bring them for consideration to Scottish Government. For example, a discussion between Commissioners on 27 March 2020 identified direct cash payments for those entitled to free school meals and an expressly trauma informed approach to policing as aspects of the Northern Irish response we wanted to advocate for in Scotland.

196. We were also able to use our collective authority positively in raising issues at both international and domestic level. For example, in December 2020, the four UK Children's Commissioners came together to raise thirty issues of concern with the United Nations Committee on the Rights of the Child. This was part of the regular UN reporting process and is an important part of our roles as Independent Children's Rights Institutions (ICRIs). We took the opportunity to highlight the impact of the pandemic on issues like poverty and mental health, which were already of serious concern before Covid hit. We also noted our particular concerns for disabled children. (NK/81 [INQ000146891])

197. On 13 January 2021, the UK Commissioners wrote as a group to the Chair of the JCVI, asking for teachers to be prioritised for vaccination in order to ensure that staff, teachers and young people all have confidence in the school system and feel comfortable to return. We considered this to be a vital first step in limiting the devastating impact of the pandemic on children's rights. (NK/82 [INQ000146899])

World Health Organisation (WHO) Technical Advisory Group on schooling during COVID-19

198. On 15 October 2020 the Commissioner was asked by Dr Martin Weber, Programme Manager, Child and Adolescent Health, WHO Regional Office for Europe, to join the World Health Organisation (WHO) Technical Advisory Group (TAG) on schooling during COVID-19. This group of 25 experts from across Europe was tasked with providing strategic and technical advice to WHO/EURO on matters relating to schooling in times of COVID-19 transmission and containment. It advised WHO/EURO on issues around reopening and potential reclosure of schools within the context of the coronavirus response, and other measures and their prioritization for infection control, taking into

consideration the latest available evidence and early experience of infection prevention measures being taken. (NK/83, [INQ000146869])

199. The group was primarily made of epidemiologists, paediatricians, and public health experts. The Commissioner was the only human rights expert invited onto the group.

200. The TAG met online nine times between October 2020 and May 2022, and held three high-level meetings with Government Ministers from across Europe. During the meetings the TAG heard expert evidence relating to the developing knowledge of the pandemic and the impacts on children and produced a series of recommendations for national governments.

201. Membership of the TAG allowed the office to benefit directly from involvement in the discussions at WHO level, in terms of informing our own positions. We were also able to bring our expertise in children's human rights into the centre of that group.

202. The recommendations from the TAG directly influenced our own decision making and positions on issues like face masks and vaccination. The discussions also provided early and invaluable information for us on issues like long covid, and the long-term impacts of school closures. In January 2022, the group drew together its work in a report which made a series of recommendations. It recognised the critical importance of keeping schools open, that school closures and other infection control measures risk adverse effects on a wide range of children's rights, and highlighted the need to ensure children are able to participate in decision-making. (NK/84 [INQ000146879])

Relationship with UK Government and reserved issues

203. This statement focuses on the legal measures and policy decisions which had the most direct and immediate effect on children, and these were predominantly within devolved competence. However, there were exceptions that straddled both reserved and devolved areas of responsibility.

204. In July 2020, Anne Longfield, then Children's Commissioner for England, secured a commitment from Sir Patrick Vallance, the Chief Scientific Advisor, for a virtual Q&A with children and young people. The intent was to assist communication with children and families around the return to school and provide an opportunity for children to hear directly about the latest scientific advice and to put questions directly to SAGE. Two of

our Young Advisers participated in the event on behalf of Scottish young people. Their questions were as follows:

"What are the scientific reasons for believing that young children pose a lower risk of transmitting the virus (to their peers or other people) than older children, and does social distancing reduce that risk?"

"When did the scientific evidence on risks of asymptomatic transmission first emerge and how did the understanding of those risks develop over time? Were particular circumstances identified as posing a particular risk of transmission?"

205. Unfortunately, over the few days immediately prior to the event, there were repeated attempts by the SAGE secretariat to rewrite the young people's questions due to concerns that they might stray into "policy". In fact, the suggested revisions went beyond that and exhibited an attempted degree of control over the questions that were inappropriate. In the event, these attempts, which included a threat to pull out of the event entirely the night before it was due to take place, were strongly and successfully resisted by staff from all of the UK Commissioners' offices. It was notable that the scientists themselves appeared quite comfortable handling the questions on the day. It was however, a good example of the level of discomfort adults can feel when children and young people enter 'their' spaces and the degree of attempted gatekeeping and control that can occur. (NK84A [INQ000613919])

206. As part of our prioritisation of children whose rights were most at risk, we undertook a targeted piece of work addressing the situation of refugee and asylum-seeking mothers and children accommodated by the Home Office's contractor (Mears Group Plc) in Glasgow. At the start of the pandemic, a group of pregnant women, mothers and their young children (aged between 0-2 years) were moved from the flats in which they had been living to be accommodated into what was described as a "Mother and Baby Unit". This was ostensibly to ensure they could be provided with better support.

207. However, in practice, the mothers found the unit oppressive; a worse environment than the one they had been in previously, and the process of being moved was often described as traumatic. They reported serious negative impacts on their physical and mental health, and on the safety and development of their babies and infants. At their invitation, members of staff visited the unit on 7 June 2020 (during the period in which

the first lockdown was eased) and produced a human rights report which was provided to Mears initially in confidence.

208. The report was also sent to Glasgow City Council, and NHS Greater Glasgow and Clyde who were both supporting Mears' actions via the Glasgow Health and Social Care Partnership. We were concerned both about the actions of Mears on behalf of the Home Office towards a vulnerable group, and the support/lack of challenge these actions received from Scottish public authorities. For example, Glasgow City Council had previously assessed the building in which the women and children were housed as unsuitable for single homeless men, but was happy to support it being used to accommodate vulnerable women and children. We contacted the Council to ask for their support in challenging Mears' approach but they declined to do so.

209. Although in November 2021 Mears wrote to us committing to close the unit and move the mothers and children into more suitable accommodation, there were significant delays to this process. These led us to publish and lay the report in the Scottish Parliament in May 2022, and issue a public call for urgent action. A few weeks later all the mothers were moved out and into more suitable dispersal accommodation. (NK/85 [INQ000146895])

210. The human rights violations inherent in the UK Government's asylum and immigration policy have been well established. While there have been some improvements, the present UK government has yet to indicate an intention to depart significantly enough from the policy approaches of its Conservative predecessors. It was striking that Covid exacerbated the dehumanising way in which refugee children and their families can be, and are still, treated by the State and its contractors, with convenience for contractors/service providers prioritised over rights and human dignity. It was concerning that the opportunities for Scottish public bodies to act in line with their own human rights duties to mitigate these harms were not taken.

Statement of Truth

I believe that the facts stated in this witness statement are true. I understand that proceedings may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief of its truth.

Personal Data

Signed:

Dated: 9 July 2025