

**Professor Aoife Nolan**

## **Should Schools Reopen? The Human Rights Risk**

Submission to the Scottish Parliament Education and Skills Committee

(Based on an Advisory Note for the Independent SAGE Report on '[When Should a School Reopen?](#)', published 28 May 2020)

*Professor Aoife Nolan<sup>1</sup>*

### Introduction

Human rights, including those of children (child rights) are often incorrectly misunderstood to function solely as reactive tools of accountability, wielded by courts against the elected branches of government. In fact, **human rights' key function is to serve as a framework for state action and decision-making** from the get-go. As such, the aim of this submission is not to suggest how human rights can be deployed by litigants to challenge school re-openings in court. Rather, it seeks to make clear **how human rights can and should shape the Scottish government's approach with regard to school reopening**. In doing so, it will focus primarily on **the human rights law obligations set out in UN treaties**.<sup>2</sup> These are duties that Scotland must comply with as a matter of international law, although they cannot be relied on directly as the basis for legal actions before the domestic courts unless incorporated.

Thus far, the emphasis in media and other discussions of school reopening has largely been on parental choice and school staff responsibility. **International human rights law is state-centric**: human rights law imposes a range of duties on the state. **The Scottish government should not delegate its ultimate responsibility in devolved areas for satisfying the UK's international human rights obligations to schools, parents or anyone else**.<sup>3</sup> Rather, the government must set up the structures and create the conditions that are conducive to ensuring that international human rights law obligations are fulfilled.

### The Rights Risks of School Closures - and Reopening

The Independent SAGE [report](#) identifies a number of groups who will be directly impacted by school reopening. These include **children, educational workers** (teaching and school support staff) and the wider **community** (e.g., parents/grandparents/guardians). Members of each of these groups, as the report

---

<sup>1</sup> Professor of International Human Rights Law and Co-Director of the Human Rights Law Centre, University of Nottingham.

<sup>2</sup> Domestic law also imposes a number of relevant human rights standards via the Human Rights Act 1998. These include: Article 2 ECHR (right to life); Article 2(1) Protocol 1 ECHR (the right to education); Article 3 ECHR (the right to freedom from inhuman or degrading treatment); Article 8 ECHR (right to respect for private and family life) and Article 14 ECHR (non-discrimination). This submission will focus on international human rights law as this permits engagement with a far wider range of issues than would be possible in terms of the considerably more narrow domestic human rights law schema.

<sup>3</sup> See K. Boyle, 'Models of Incorporation and Justiciability for Economic, Social and Cultural Rights' (Scottish Human Rights Commission, 2018), p.12.

makes clear, will be affected differently by schools reopening and, as such, their human rights will be impacted in diverse ways.

Starting with children, the findings in the report and other sources make clear that **school closures have had a very significant impact on a wide range of children's rights**. These rights are set out in the UN Convention on the Rights of the Child (UNCRC),<sup>4</sup> an international treaty that the UK volunteered to be bound by in 1991. The Scotland Act 1998 confers devolved competence on the Scottish Government and the Scottish Parliament to observe and implement the UNCRC.<sup>5</sup> The implications for the child's **right to education** are most evident (Article 28 UNCRC) – and this has been particularly severe for children who experience digital exclusion or for whom online learning is neither accessible nor appropriate. Relatedly, loss of access to school meals has had an impact on many children's **right to adequate nutritious food** (Articles 24 and 27 UNCRC). For children living in poor quality housing, school closures and lockdown have resulted in their spending extensive time in conditions inconsistent with their **right to a standard of living adequate for their development** (Article 27 UNCRC). Increased social isolation has had detrimental effects on children's enjoyment of **the right to the highest attainable standard of mental health** (Article 24 CRC), while school closures have increased children's exposure to a wide range of threats, from parents, carers and others, as well as online. This runs contrary to their **right to freedom from all forms of violence, injury or abuse** (Article 19 UNCRC). School closures have, together with the lockdown situation, also impacted on children's **rights to play** (Article 31 UNCRC), **freedom of association** (Article 15) and the **right to seek, receive and impart information** (Article 13). The impact on all children has not been equal: **poor, disabled and socially vulnerable children suffered disproportionately from school closures**. This raises questions about whether the government has guaranteed these rights for all children without **discrimination** (Article 2 UNCRC).

That said, **the closure of schools was undoubtedly justifiable in human rights terms**: the UN Committee on the Rights of the Child – the body responsible for monitoring the implementation of the UNCRC by the UK, including Scotland – has stated that 'international human rights law exceptionally permits measures that may restrict the enjoyment of certain human rights in order to protect public health'.<sup>6</sup> These **restrictions must be imposed only when necessary, be proportionate and kept to an absolute minimum**.<sup>7</sup> There is little doubt that the government's decision to close schools met this requirement, given the infection rate and the risks posed to the rights to life, survival and development and health of children (Articles 6 and 24 UNCRC), as well as the rights to life, to health and to safe and healthy work conditions of school staff in mid-March 2020 (see below). **There are serious questions to be asked about whether the government took adequate steps to ameliorate negative**

---

<sup>4</sup> These rights are also found in a number of other international and regional human rights treaties but the UNCRC will be the key focus of this submission.

<sup>5</sup> Schedule 5 para.7(2)(a).

<sup>6</sup> Committee on the Rights of the Child,

[https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/1\\_Global/INT\\_CRC\\_STA\\_9095\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/1_Global/INT_CRC_STA_9095_E.pdf) (8 April 2020).

<sup>7</sup> Ibid.

**rights risks/impacts that became clear following the closure of schools**, particularly in relation to service provision and support for poor and otherwise socially vulnerable children. However, the fact remains is that the **closure itself was human rights compliant**.

One might be tempted to argue that the simplest solution to these child rights issues is simply to reopen schools. However, **early reopening of schools in the absence of adequate risk mitigation and protection measures raises clear threats to children's right to the highest attainable standard of health**, and – in a small number of cases – may jeopardise their **right to life, survival and development** (Article 6 UNCRC). Furthermore, given that the health risks faced by certain groups of children are higher than for others (BAME, children with underlying health conditions), questions of **non-discrimination** and the requirement that states take targeted measures to protect children in vulnerable situations during COVID-19 also arise.<sup>8</sup> It is also worth noting that the use of disciplinary sanctions against students who do not comply with social distancing and hygiene requirements may also result in some children experiencing **discrimination in terms of their enjoyment of the right to education**. In addition, **while most children will be in a position to return to school, there will inevitably be some for whom this will not be possible** due to the particular health risks or other challenges they face. If such children are to enjoy their **right to education on an equal basis to children in school**, then they must be provided with **available, accessible, acceptable and adaptable education**, in line with their needs and specific situation. Unlike the opening of schools in England on 1 June, Scotland is not planning on opening schools until 11 August. However, these child rights issues are still of direct relevance.

There are two final, primarily **process-related, elements of international child rights law** that need to be complied with for school reopening to conform with international human rights law. First, the government is required to ensure that the '**best interests** of children' is a primary consideration when it comes to decision-making around school reopening.<sup>9</sup> This requires a careful risk assessment focused on the wide-ranging impacts of this course of action on children's interests. Second, the state must ensure that children who are capable of forming their own views (which covers the vast majority of children in the education system) enjoy their **right to express those views** with regard to school reopening decision-making. In terms of the UNCRC, those views must be given 'due weight in accordance with the age and maturity of the child'. It should be noted that these requirements do not mean that the best interests or the views of children in relation to school reopening should trump those of others – but they do require children's best interests and views to be factored into decision-making. In practice, there is **no evidence that these process obligations have been complied with** in the government's decision-making on school reopening.

The Independent SAGE report makes clear that reopening schools will also have implications for the health and wellbeing - and potentially lives - of school staff, parents

---

<sup>8</sup> Ibid.

<sup>9</sup> See Article 3(1) UNCRC.

and household contacts. All of these individuals enjoy the **right to life**<sup>10</sup> and the **right to the highest attainable standard of health** under international human rights law.<sup>11</sup> Amongst other things, this latter right requires states to take the steps necessary for the ‘prevention, treatment and control’ of epidemic diseases.<sup>12</sup> This does not oblige the Scottish government to do the impossible. Rather, the government is required to give effect to this duty as quickly and effectively as possible in light of all of the financial, human, scientific, technological and other resources available to it. It is hard to see how a government decision that (avoidably) reduces people’s enjoyment of this right is consistent with that duty. Furthermore, **the government must ensure enjoyment of the right to health without discrimination**. This latter obligation is not satisfied where **government decision-making fails to take into account the greater vulnerability of particular individuals and communities to increased transmission caused by schools reopening**.

School staff also have **the right to safe and healthy work conditions**.<sup>13</sup> In the COVID-19 context, this requires the state to ensure that they are protected from the risks of contagion at work, and to adopt appropriate regulatory measures to ensure that employers (state or private) minimise the risks of contagion according to best practice public health standards.<sup>14</sup> Again, it is hard to see how early reopening can be regarded as in line with that requirement. This is particularly so if measures have not been taken to ensure that **the special COVID-19 related vulnerability of at-risk groups (BAME and disadvantaged communities) is factored into and addressed in reopening plans**.

#### Mutually Supporting and Indivisible

All decision-making involving tensions or conflicts between rights will require a balancing exercise to be carried out; this is part and parcel of human rights law standards and practice. However, **children’s rights in the context of school reopening cannot be used to justify avoidable harms done to the rights to life, health and non-discrimination of others**.

**Human rights law does not conceptualise children’s rights as trumps. Rather, they are just one element of the broader human rights framework.** However, children’s social vulnerability and the fact that they have had no opportunity – whether directly through consultation or indirectly through voting, etc – to input into decision-making on school reopening means that **children’s rights have to be given special attention and priority by decision-makers**. This also applies in the school reopening context.

**Children are embedded in their communities. They and their rights do not exist in isolation from other right-holders** and should not be considered in isolation from

---

<sup>10</sup> Article 6 of the International Covenant on Civil and Political Rights (ratified by the UK in 1976).

<sup>11</sup> Article 12 of the International Covenant on Economic, Social and Cultural Rights (ratified by the UK in 1976).

<sup>12</sup> See, e.g., UN Committee on Economic Social and Cultural Rights, [General Comment No. 14 on the right to the highest attainable standard of health](#) (2000), UN Doc. E/C.12/2000/4.

<sup>13</sup> Article 7(b) of the International Covenant on Economic, Social and Cultural Rights

<sup>14</sup> Committee on Economic, Social and Cultural Rights, [Statement on the coronavirus disease \(COVID-19\) pandemic on economic, Social and cultural rights](#) (17 April 2020).

them. A school reopening that is ostensibly justified in terms of children's rights/ interests, but which ignores children's location within their communities and the implications of that reopening for the rights of those who teach, care and share society with them would reflect a partial and flawed understanding of what human rights – and children's rights – require. Indeed, moving back to a more child-centric lens, where a school reopening results in increased risk for those who teach, care and share society with children, this will have implications for children's rights also: enjoyment of their family rights (in terms of their reduced engagement right or loss of relatives/carers), their health rights (through increased risk of transmission), and their right to freedom from discrimination (for example, given the particular vulnerability of the BAME community to COVID-19).

### Conclusion

The Independent SAGE report published on 28 May 2020 makes clear that **reopening schools without satisfying the criteria outlined in the report poses significant risks to children, education workers and the wider community**. The report provides information on how these risks can and should be mitigated so as to enable safe reopening of schools. Key measures include: carrying out a wide-ranging risk assessment and subsequent implementation of appropriate infection control procedures; through waiting for (verifiable) local infection levels to decrease sufficiently; by ensuring adequate facilities and equipment in terms of hygiene and personal protection; and the establishment of local-level test, trace, isolate infrastructure.

This submission outlines the international human rights duties that the Scottish government should take into account when considering whether to reopen schools. **Children are certainly not enjoying all of their rights while schools are closed. However, that does not set at nought or outweigh the human rights risks posed by a rushed reopening.**